Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

CITY OF BLUE SPRINGS, MISSOURI, et al.,

Petitioners,

vs.

RONALD KINCADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a public employee's verbal report to his supervisors on a topic of potential interest to the public, made in the course of responding to a specific work assignment, necessarily constitute speech made "as a citizen" and "upon matters of public concern" protected by the First Amendment under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983)?

II. Because the protected status of a public employee's verbal report to his supervisors, made as a job assignment, is not "clearly established," does this Court's decision in *Hunter v. Bryant*, 502 U.S. 224 (1991) (*per curiam*), compel a grant of qualified immunity to government officials prior to trial?

PARTIES TO THE PROCEEDING

The following entities or individuals are parties to this proceeding:

Petitioners:	The City of Blue Springs, Missouri Gregory Grounds Russell Clark Evelyn Ericson Larry Morgan Emil Spears
Respondent:	Ronald Kincade

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 64 F.3d 389 (8th Cir. 1995), and is reproduced in the Appendix at App. 1. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in the Appendix at App. 21. The unreported order of the United States District Court for the Western District of Missouri adopting the Report and Recommendation and Supplemental Report and Recommendation of the Magistrate Judge is reprinted in the Appendix at App. 22. The Report and Recommendation and Supplemental Report and Recommendation of the Magistrate Judge are reprinted at App. 26 and App. 47, respectively.

JURISDICTIONAL STATEMENT

On August 25, 1995, the Eighth Circuit entered its opinion in this case arising under 42 U.S.C. § 1983. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order dated October 12, 1995. This Petition is being filed within 90 days of October 12. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

(a) First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech. . . .

(b) Fourteenth Amendment, United States Constitution:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

(c) 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Respondent Kincade, an at-will employee of the City of Blue Springs, Missouri, was terminated as the City's Engineer/Director of Public Works on October 24, 1991. (App. 6). Respondent brought suit in the United States District Court for the Western District of Missouri pursuant to 42 U.S.C. § 1983, alleging that his termination violated the First Amendment because it was in retaliation for his speech made in the course of performing a work assignment. (App. 6).[1]

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[1] Jurisdiction was exercised in the district court pursuant to 28 U.S.C. §§ 1332 and 1343.

Among other duties, Kincade's job description required him to meet with and advise the City Administrator, the Mayor, and the Board of Aldermen (BOA) regarding construction and development projects in the City. (App. 3). After respondent was hired on June 4, 1990, one of the first assignments he received was to evaluate the status of a privately-constructed dam upon which the City intended to build a future roadway, and to report his findings or conclusions to the BOA. (App. 3).

Nearly one year after receiving the assignment, on August 5, 1991, Kincade gave a verbal report on the assignment to the BOA during an executive session not open to the public. (App. 3). Kincade gave this report in his capacity as City Engineer and in direct response to the assignment from the BOA. (App. 3).

At the August 5, 1991 BOA meeting, respondent allegedly offered the following findings and conclusions:

> (1) that the north end of the dam did not have required embankment materials;
>
> (2) that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present, thereby incurring [sic] the likelihood of erosion and reduced structural integrity of the dam;
>
> (3) that additionally, the emergency spillway was not constructed of concrete as required by the design plans, thereby contributing to the potential of erosion of the dam;
>
> (4) that the design for the dam had called for a 50 foot width at the top;

> (5) that the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway;
>
> (6) that the dam was actually 42 to 49 feet wide as of August 1991;
>
> (7) that the City had paid $62,510 to [the developer] in June of 1987, even though the work had not been completed;
>
> (8) that the dam had never been certified in compliance with the Development Agreement or the 1987 [geotechnical engineers'] report; and
>
> (9) that because of the inadequacies of the dam, homes and residents in those homes downstream from the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the above inadequacies.

(App. 4-5 n.2). Petitioners concluded that Kincade's report was wholly inadequate for the assignment he was given. (App. 5).

On October 21, 1991, a majority of the BOA voted to request Kincade's resignation or to terminate him if he would not resign. (App. 5). Kincade refused to resign, and his employment as the City Engineer was terminated on October 24, 1991. (App. 6).

Shortly after his termination, Kincade filed suit on January 28, 1992 pursuant to 42 U.S.C. § 1983, contending that he was unlawfully terminated for making statements protected by the First Amendment. (App. 6). Petitioners

moved for summary judgment on the basis that Kincade's speech was not protected under the First Amendment and on the basis that the city officials should, in any event, be entitled to qualified immunity, as Kincade's First Amendment right to speak as an employee in response to a specific work assignment was not "clearly established" at the time of petitioners' actions. (App. 6). The Magistrate Judge prepared a Report and Recommendation (App. 26) and a Supplemental Report and Recommendation (App. 47), recommending that petitioners' summary judgment motions be denied in regard to Kincade's August 5, 1991 speech. On May 19, 1994, the district court adopted the Magistrate Judge's reports and recommendations. (App. 22). Petitioners timely appealed the district court's ruling. (App. 6-8).

Affirming the denial of petitioner's motion for summary judgment, the Eighth Circuit concluded that respondent's August 5, 1991 speech, made pursuant to a work assignment in his capacity as City Engineer, was constitutionally protected on the ground that it was a matter of "public concern." (App. 15). The court further determined that the individual petitioners were not entitled to qualified immunity. (App. 19-20). Rehearing and rehearing en banc were denied. (App. 21).

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE CIRCUITS ON THE IMPORTANT AND RECURRENT ISSUE OF WHETHER A PUBLIC EMPLOYEE'S SPEECH MADE IN RESPONSE TO A SPECIFIC WORK ASSIGNMENT CONSTITUTES PROTECTED SPEECH "AS A CITIZEN UPON MATTERS OF PUBLIC CONCERN" UNDER THE FIRST AMENDMENT

A. General Principles

It is well established that a public employee is not stripped of all First Amendment rights to comment on matters of public concern merely as a result of government employment. *See Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). It is equally well established, however, that not all speech by a government employee is constitutionally protected. *See Rankin*, 438 U.S. at 383. Since *Pickering* was decided almost three decades ago, the circumstances in which a public employer may discharge an employee for speech made in the course of employment is an issue that has continued to perplex the lower courts. This is particularly true in cases such as the present one in which the employee's speech consists solely of an internal report to the employer made as part of a work-related assignment, rather than volitional speech made to inform the public.

In *Pickering*, this Court held that, to determine whether the speech of a government employee is protected under the First Amendment, a court's task is to strike "a balance between the interests of the [employee],

as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court further instructed that before engaging in the *Pickering* balancing test, a court must first determine, on the basis of "the content, form, and context of a given statement, as revealed by the whole record," the capacity in which the employee was speaking. 461 U.S. at 147-48. The Court in *Connick* held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147.

Significantly, the Court in *Connick* highlighted "[t]he repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' " noting that *Pickering*'s language was not "accidental." *Id.* at 143. Rather, *Pickering*'s focus on whether the employee's speech is made as a citizen "reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.*

B. This Case Presents A Substantial Question Not Resolved By This Court's Prior Decisions

Since *Connick*'s elaboration on the *Pickering* balancing test, this Court has not further addressed the circumstances, if any, in which a government employee's speech, made while performing or in furtherance of a work assignment, is entitled to constitutional protection. *See Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.) (*en banc*) (Supreme Court "has not specifically addressed the issue of whether speech in the course of and as a part of an employee's ordinary duties is or is not per se protected."), *cert. denied*, 488 U.S. 909 (1988). The test enunciated in *Connick* relies on the distinction between an employee speaking "as a citizen upon matters of public interest" and "as an employee upon matters only of personal interest." 461 U.S. at 147. This dichotomy does not address the question of whether, and if so when, speech made as an employee and that touches upon matters of interest to the public is protected. That is the situation this case presents.

The lower courts have struggled greatly in dealing with the issue presented in this case, resulting in a hodgepodge of approaches and inconsistent results. The courts of appeals are in disarray, having "adopted various approaches for determining whether a topic of employee speech is of 'public concern'. . . . " *O'Connor v. Steeves*, 994 F.2d 905, 913 (1st Cir.), *cert. denied*, 114 S.Ct. 634 (1993), *cited in Waters v. Churchill*, 114 S. Ct. 1878, 1896 (1994) (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.) (courts encounter difficulties in determining whether speech pertains to a matter of public concern); *see also*

Koch v. City of Hutchinson, 847 F.2d 1436, 1445 (10th Cir.) (*en banc*) ("Lower court efforts to draw more specific guidance from the Supreme Court's language and case law have resulted in a variety of statements and decisions."), *cert. denied*, 488 U.S. 909 (1988); *Egger v. Phillips*, 710 F.2d 292, 313 (7th Cir.) (*en banc*) (noting "plethora of cases in which courts are with increasing frequency being called upon to confront" protected status of public employee speech, and the resulting difficulty in resolving conflicting interests and case law), *cert. denied*, 464 U.S. 918 (1983); *McKinley v. City of Eloy*, 705 F.2d 1110, 1113 (9th Cir. 1983) ("courts have had some difficulty deciding when speech deals with an issue of 'public concern.' ").

C. There Is A Conflict In The Circuits

The Eighth Circuit's analysis in this case, relying entirely on the content of the speech at issue, stands in stark contrast to the approaches adopted in cases from other circuits, as well as in prior Eighth Circuit decisions. The varied approaches adopted by the courts of appeals, resulting in contradictory and inconsistent rulings between the circuits (and even within the same circuits) regarding when public employee speech is of "public concern," demonstrate a need for clarification of this frequently litigated issue of federal law.

Contrary to this Court's instruction in *Connick*, the Eighth Circuit essentially ignored the "form and context" of respondent's speech, i.e., that he specifically was assigned to make the report, that he did so only in his capacity as an employee in the course of performing the assigned work, and that he in no way attempted to

expose alleged misconduct or to communicate anything whatsoever to the public. The Eighth Circuit instead relied entirely on whether the content of the alleged speech might have been of some hypothetical interest had it been communicated to the public:

> We conclude that Kincade's August 5, 1991, speech touched upon matters of public concern. . . . Kincade's comments were of interest to the community and did not involve issues that were relevant only to the employees of the City. Kincade's comments clearly were not limited to matters of personal interest to him only. . . . [His] statements concerned potential danger to the community's citizens, which surely is a matter of concern to the public and not of some personal interest solely to the speaker.

(App. 12).

A number of cases from other circuits turn first and foremost on the question of whether the government employee was speaking primarily as a citizen or as an employee, a distinction the Eighth Circuit inexplicably ignored. For example, in *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), the Fifth Circuit held that a police officer's speech reflecting his scrutiny of the performance of the university system's police chief was not entitled to First Amendment protection, despite its potential interest to the public, because the plaintiff spoke as an employee, not as a citizen. *Id.* at 1362-63. Writing for the court, Judge Higginbotham observed:

> Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or

> importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee. *In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.*

Id. (footnotes omitted; citing *Connick*, 103 S. Ct. at 1690-91 & n.8) (emphasis added).

The court in *Terrell* further relied upon the fact that the plaintiff made no effort to communicate the information to the public and, to the extent that future public disclosure was contemplated, noted that the issues had remained "a wholly intragovernmental concern at the time Terrell was fired." *Id.* at 1363. The Court therefore found it "inescapable" that "Terrell was not terminated for speaking 'as a citizen upon matters of public concern.' " *Id.* (citing *Connick*, 103 S. Ct. at 1690).

Numerous cases from the Fifth Circuit and from other circuits have followed the "employee" versus "citizen" course charted by Judge Higginbotham in *Terrell*.[2]

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[2] *See, e.g., Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir. 1993) (court must determine whether employee "spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee"; quoting *Terrell* with approval regarding irrelevance of potential public interest in speech at issue), *cert. denied*, 114 S.Ct. 2708 (1994); *Gillum v. City of Kerrville*, 3 F.3d 117, 120-21 (5th Cir. 1993) (focus is on extent to which employee spoke as citizen or as employee rather than on inherent "importance" of subject matter, reasoning that "This focus . . . reflects

Other appellate cases have employed a different analysis, concentrating not on the capacity in which the

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the reality that at some level of generality almost all speech of state employees is of public concern" and avoids content-based inquiries), *cert. denied*, 114 S.Ct. 881 (1994), cited in *Waters v. Churchill*, 114 S. Ct. 1878, 1896-97 (1994) (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.); *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1198 (8th Cir. 1993) (focus is on employee's role as citizen or employee rather than public's interest in topic; in assessing role in which employee spoke, court considers employee's attempts to communicate speech to public at large and employee's motivation; citing *Terrell*); *Thomson v. Scheid*, 977 F.2d 1017, 1020-21 (6th Cir. 1992) ("First Amendment protection . . . does not extend to speech made in the course of acting as a public employee"; "internal office communication does not necessarily give rise to a constitutional claim"; conversations regarding employee's investigation of fraud "concern[ed] plaintiff's duties as an employee"; state employee "was acting in the course of his employment in his conversations with" federal law enforcement officials), *cert. denied*, 113 S. Ct. 2341 (1993); *Marquez v. Turnock*, 967 F.2d 1175, 1178 (7th Cir. 1992) ("In speaking on this issue, Marquez did not act simply as a member of the general public; it was his *job* to investigate such violations and make recommendations. . . . ") (emphasis original); *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991) ("Issues rise to the level of public concern if an individual speaks primarily in his role as a citizen rather than as an employee"); *Schalk v. Gallemore*, 906 F.2d 491, 495 (10th Cir. 1990) (*per curiam*) ("pertinent inquiry is whether the actor is speaking as a citizen or an employee"; speaker's subjective intent or motive is relevant to this determination); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986) ("The focus is on the role that the employee has assumed in advancing the particular expressions. . . . "); *see also Egger v. Phillips*, 710 F.2d 292, 317-18 (7th Cir.) (*en banc*) (significant factor is that plaintiff's communications were part of his job, and an assessment of competency "implicates internal agency concerns," not "public concerns"), *cert. denied*, 464 U.S. 918 (1983). *But see Swineford v. Snyder Co.*

employee speaks, but rather primarily on the employee's subjective intent or motive in speaking. In *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), a municipal police chief claimed that discipline he received as a result of comments he made while apparently attempting to recruit a replacement for the village manager violated his First Amendment rights. The Seventh Circuit looked to his intent in speaking in determining whether the speech was protected:

> [T]he Connick test does not consist in looking at what might incidentally be conveyed by the fact that the employee spoke in a certain way. The test requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?

771 F.2d at 1010. The court in *Linhart* concluded that it was not the plaintiff's intention to speak on a matter of public concern – "his aim . . . was something 'only of personal interest,' and thus does not amount to protected speech." *Id.*

A significant number of decisions have followed in whole or in part the approach detailed in *Linhart*.[3]

Pennsylvania, 15 F.3d 1258, 1271 (3d Cir. 1994) (quoting *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983) (speech by public employee deemed to be of public concern when it relates to employment unless "upon matters of only personal interest")).

[3] *See, e.g., Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1187 (6th Cir. 1995) ("The Seventh Circuit offers a particularly instructive explanation of the Connick test in *Linhart* . . . ");

In *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S.Ct. 634 (1993), the First Circuit applied yet a different analysis to the threshold inquiry under *Connick*. The *O'Connor* court began by dividing the disparate analytical approaches of the other courts into two branches, which it described as "content-based," *i.e.*, treating the objective content of the speech as determinative, but examining the "form" and "context" of an employee's speech in "marginal" cases, and "contextual," *i.e.*, focusing entirely or partially on the employee's subjective intent in making the speech. Apparently dissatisfied with

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Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 781 (2d Cir.) ("Our review . . . convinces us that Ezekwo was not on a mission to protect the public welfare. Rather, her primary aim was to protect her own reputation. . . . "), *cert. denied*, 502 U.S. 1013 (1991); *Callaway v. Hafeman*, 832 F.2d 414, 416, 417 (7th Cir. 1987) (assessing "goal" of the speech at issue, and quoting *Linhart*); *Gomez v. Texas Dept. of Mental Health*, 794 F.2d 1018, 1022 (5th Cir. 1986) ("Whatever the significance of Gomez' speech and conduct might have been, he was not seeking to alert the public to any actual or potential wrongdoing or breach of the public trust. . . . "); *see also Davis v. West Community Hosp.*, 755 F.2d 455, 461-62 (5th Cir. 1985) (concluding that plaintiff's statements were motivated by personal conflicts); *Wilson v. City of Littleton*, 732 F.2d 765, 768-69 (10th Cir. 1984) (plaintiff motivated by "personal feeling of grief"; insufficient that subject matter could in certain circumstances be a topic of general public interest); *cf. Piver v. Pender Co. Board of Education*, 835 F.2d 1076, 1079-80 (4th Cir. 1987) (plaintiff did not appear to be motivated by self-interest, but focus of *Connick* is whether public "is likely to be truly concerned with or interested in particular expression, or whether it is more properly viewed as essentially a 'private matter' between employer and employee.") (quoting *Berger v. Battaglia*, 779 F.2d 992, 998-99 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986)), *cert. denied*, 487 U.S. 1206 (1988).

both constructs, the court in *O'Connor* then embarked on a hybrid approach, holding that when a public employee speaks on a topic which is of "inherent" concern to the electorate, no further investigation of the form or context of the speech is necessary to conclude that the speech is of "public concern." *Id.* at 913-14. If, however, the speech "would not necessarily qualify, *on the basis of its content alone*, as a matter of inherent public concern," the *O'Connor* court determined that additional investigation of the actual public interest in the topic and the subjective intent of the speaker was warranted. *Id.* (emphasis original).

D. The Conflict In The Circuits Results In Different Outcomes On Similar Facts

Given the unsettled state of the law, as evidenced by the foregoing cases, it is virtually impossible in many circumstances to predict whether a public employee's speech is protected, or, indeed, even to predict the analytical framework that a court will employ in making the determination. The disparity of outcomes that results from the turmoil in this area is vividly illustrated by the fact that the Tenth Circuit reached an opposite conclusion from that of the Eighth Circuit on facts virtually identical to the present case. In *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988), the Tenth Circuit *en banc* held that a fire marshal's report made in the course of performing his duties was not protected speech under the First Amendment, even though the report stated his professional opinion as to the cause of a fire.

In reaching its conclusion that the speech was unprotected, the *Koch* court observed that the Supreme Court "has not specifically addressed the issue of whether speech in the course of and as a part of an employee's ordinary duties is or is not per se protected." 847 F.2d at 1442.[4] Although the court held that an employee's work-related speech is not *per se* excluded from First Amendment protection, the court stated that "[t]he fact that the speech at issue occurred during or as a part of an employee's official duties . . . is a significant factor which may frequently lead to a finding that speech is unprotected, because . . . speech in the course of an employee's duties will usually, if not always, reflect upon the employee's competence to perform his or her job." *Id.*[5] The court in *Koch* further observed that the plaintiff's motive for submitting his report was that it was a part of his routine duties, and that there was no evidence that the plaintiff's report or the conclusions in it were in any

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[4] The Tenth Circuit acknowledged that *Givhan v. Western Consolidated School District*, 439 U.S. 410 (1979), established that a public employee's private expression at work can be protected under the First Amendment. Givhan's speech, however, was not a job assignment, and was not made in the course of and as a part of her employment. That case therefore does not answer the question at issue in *Koch* and in the present case.

[5] Although the Eighth Circuit in this case noted that petitioners had concluded that Kincade's report was wholly inadequate (App. 5), the court nevertheless ignored that fact in its analysis. *Cf. Koch*, 847 F.2d at 1451 (quoting *Egger*, 710 F.2d at 316-18) (content of employee's speech naturally affects superior's assessment and properly forms basis for personnel decisions).

way motivated by any alleged governmental improprieties or by the desire to expose any alleged governmental improprieties. *Id.* at 1448. The court also noted that the plaintiff's report did not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government." *Id.* at 1447 (quoting *Wilson v. City of Littleton*, 732 F.2d 765, 768 (10th Cir. 1984)).

All of the statements made and conclusions drawn by the *Koch* court apply with equal if not greater force to the present case, because Kincade's opinions – unlike Koch's – never were communicated to the public at all. Were the courts of appeals employing a uniform approach to this important constitutional issue, the Eighth and Tenth Circuits likely would have reached the same result. Instead, precisely because of the differing analyses employed by these sister circuits, the *Koch* and *Kincade* courts reached opposite results. The analysis and result in a case involving important First Amendment issues ought not to depend upon geographical happenstance.

E. The Issue Is Important And Substantial

In addition to the dangers posed by inconsistent and uncertain results, this Court and the lower federal courts have been extremely reticent to elevate all public employee speech to constitutional proportions. As the Court stated in *Connick*, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case." 461 U.S. at 149; *see Terrell*, 792 F.2d at 1362 ("almost anything that

occurs within a public agency could be of concern to the public"). By imbuing a work assignment with constitutional protection, the Eighth Circuit's decision in this case comes perilously close to constitutionalizing all employment-related speech of public employees. That result will have a significant chilling effect on government employers' abilities to discipline and discharge employees based on their dissatisfaction with competence or performance.

Although this Court has made clear that "[t]he private nature of [a] statement does not . . . vitiate the status of the statement as addressing a matter of public concern," *Rankin*, 438 U.S. at 386 n.11; *see Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414-15 (1979), the Eighth Circuit has fashioned a virtually limitless protection for employee speech in the workplace. The scope of the protection created by the Court of Appeals in this case extends far beyond what is necessary or desirable to preserve the First Amendment values at issue and far beyond what this Court and other courts of appeals previously have sanctioned.

The expansive protection afforded by the Court of Appeals to public employee speech raises the prospect of potential government liability for almost any adverse employment decision. It will indeed be the rare government employee who cannot point to some alleged speech which would serve as the matter of public concern, under the definition provided by the court below, that supposedly was the basis for impermissible speech-based retaliation by the employer. Creating this type of First Amendment job protection for public employees

threatens "every employment decision bec[oming] a constitutional matter," with the inevitable consequence that government offices will function only with great difficulty. *See Connick*, 461 U.S. at 143.

The current state of the law promotes confusion and subjects governmental entities and officials in similar circumstances to those here to endless litigation because of uncertainty concerning the rights at issue. The Court should review this case to provide a uniform standard and additional guidance to the lower courts regarding this important and recurring issue of constitutional law.

II. THE RIGHT ALLEGEDLY VIOLATED IN THIS CASE WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE GOVERNMENT OFFICIALS' ACTIONS AND, BY DENYING THE OFFICIALS QUALIFIED IMMUNITY PRIOR TO TRIAL, THE LOWER COURTS DISREGARDED THIS COURT'S DECISION IN HUNTER v. BRYANT

The decisions of the district court and of the Eighth Circuit in this case improperly deprived the individual petitioners of the qualified immunity to which they are entitled. The effect of these decisions is to force these city officials to go to trial on the qualified immunity issue in violation of this Court's clear instruction in *Hunter v. Bryant*, 502 U.S. 224 (1991) (*per curiam*), which neither court below even cited.

The standards governing qualified immunity determinations are settled: a government official is entitled to qualified immunity when his or her "conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). This Court has taken pains to emphasize that this test is one of "objective legal reasonableness," which is evaluated "in light of the legal rules that were 'clearly established' at the time" the action was taken. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (*quoting Harlow*, 457 U.S. at 819).

In *Hunter*, this Court summarily reversed a Ninth Circuit decision denying two Secret Service agents qualified immunity. The court of appeals had concluded that the agents were not entitled to qualified immunity because the court believed that there might be a "more reasonable" interpretation of the facts that would have indicated probable cause did not exist to make an arrest. The Ninth Circuit therefore held that summary judgment was inappropriate because a jury should decide " '[w]hether a reasonable officer could have believed he had probable cause.' " 502 U.S. at 228 (*quoting* 903 F.2d at 721).

The Court rejected the Ninth Circuit's approach for two reasons:

> First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, *not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.*

Id. (emphasis added). The Court held that the agents were entitled to qualified immunity "because their decision was reasonable, even if mistaken." *Id.* (*citing Anderson v. Creighton*, 483 U.S. at 641).

In the present case, the Court of Appeals will effectively force these city officials to go to trial on the basis of its conclusion that another "more reasonable" interpretation of the facts exists, even though the court constructed it almost four years after the employment decision. That result clearly is impermissible under *Hunter*. *See* 502 U.S. at 228; *see also McCleary v. Navarro*, 504 U.S. 966 (1992) (White, J., dissenting from the denial of certiorari, joined by Rehnquist, C.J., and O'Connor and Thomas, JJ.) (arguing that case should have been granted, vacated and remanded for reconsideration in light of *Hunter*). As revealed by the discussion of the confused state of the law presented in the first question in this petition, *see supra* at 10-15, it certainly was not "clearly established" in 1991 that a public employee's speech was protected as that of "a citizen" speaking "on a matter of public concern," when the employee was speaking in his role as an employee pursuant to an assignment from his employer and the speech was in no way communicated to the public.

Prior to this case, the Eighth Circuit had held that when the state of the law is even "debatable," officials are entitled to qualified immunity. *Offet v. Solem*, 936 F.2d 363, 366 (8th Cir. 1991); *see also Anderson*, 483 U.S. at 640 ("in light of pre-existing law the unlawfulness must be apparent" at the time action taken); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity shields "all but the plainly incompetent or those who knowingly violate the

law."). When a difference of views exists among courts applying prior legal rulings regarding issues such as the protected status of a government employee's speech, the law is "not so apparent that [it] can be said to have been 'clearly established' at the time defendants acted." *Offet*, 936 F.2d at 367.

The law regarding the protected status of the respondent's speech is – to say the least – currently unsettled. *See supra* at 10-15. It certainly could not have been "clearly established" when the termination decision was made in 1991. That conclusion (and the corollary conclusion that the individual petitioners are improperly being forced to trial) are inescapable in light of two Eighth Circuit cases, *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1998 (8th Cir. 1993) ("to decide whether speech is on a matter of public concern . . . we focus on the employee's role in conveying the speech *rather than the public's interest in the speech's topic.*"), and *Mumford v. Godfried*, 52 F.3d 756 (8th Cir. 1995) (employee speaking on a matter of public interest when he expresses his personal opinion on issue of concern to the community, even if speech not directly or indirectly intended to reach the public), which reflect differing views on the protected status of a government employee's speech made in the role and capacity of employee. Obviously, if different panels of the court of appeals express the governing legal standard at issue differently, requiring the second panel to explain and clarify the first ruling, the law could not have been "sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." *Anderson*, 483 U.S. at 640.

In the present case, the Eighth Circuit states that "[a]t the time of Kincade's termination, the cases made clear that speech touches upon a matter of public concern when it deals with issues of interest to the community." (App. 19). As support for this proposition, the Court cited *Connick v. Myers*, 461 U.S. 138, 146 (1983), and *Cox v. Dardanelle Public School District*, 790 F.2d 668, 672 (8th Cir. 1986). The panel's citation of *Connick* and *Cox* is revealing, precisely because the Eighth Circuit's own differing views of those cases as articulated in *Bausworth* and *Mumford* leave no room for doubt that the state of the relevant law in 1991 certainly was, at a minimum, debatable.[6]

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[6] Also, the Court of Appeal's formulation of the relevant "legal rule" is problematic because of the level of generality with which it is stated, given Kincade's status as a public employee speaking as an employee. *See Anderson*, 483 U.S. at 639. It is apparent that the relevant legal rule employed by the Eighth Circuit contravenes this Court's instruction in *Anderson* because it was simply too broad and general. Rather than determining whether it was clearly established in 1991 "that speech touches upon a matter of public concern when it deals with issues of interest in the community," as the panel states, the relevant formulation should have been tailored more narrowly: the objective legal reasonableness of defendants' actions should be assessed based upon whether it was clearly established in 1991 that a public employee's speech was made "as a citizen" and "on a matter of public concern" when the employee was speaking as an employee, in a non-public forum, pursuant to an assignment from the employer. *See Anderson*, 483 U.S. at 640 ("the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense. . . . ").

In *Bausworth*, a 1993 decision, the Eighth Circuit affirmed the dismissal of a government employee's section 1983 action, determining that although the employee's speech might have been of interest to the public, because the employee spoke as an employee, and not as a citizen, her speech neverthless was *not* on a matter of public concern, and thus was not protected by the First Amendment. 986 F.2d at 1198. Pointedly, the court in *Bausworth* observed that

> In making our examination, *we focus on the employee's role in conveying the speech rather than the public's interest in the speech's topic. Thus, speech is a matter of public concern when a public employee speaks as a concerned citizen, but not when the employee speaks as an employee.* When focusing on the employee's role, we consider whether the employee attempted to communicate the speech to the public at large and the employee's motivation in speaking. Absent highly unusual circumstances, a federal court is not the appropriate forum for reviewing a public employer's reaction to an employee's speech when the employee did not speak *as a citizen* on a matter of public concern.

Id. (emphasis added; citations omitted). In support of these propositions, the *Bausworth* court cited, among other cases, *Connick* and *Cox*, both of which had been decided prior to Kincade's termination.[7]

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[7] The lack of clarity of the established law is further reflected in the flatly contradictory statements contained in *Bausworth* and in the present decision. In *Bausworth*, the Eighth Circuit stated that "to decide whether speech is on a matter of public concern . . . we focus on the employee's role in conveying

Nearly four years after Kincade's termination, the Eighth Circuit decided *Mumford v. Godfried*, 52 F.3d 756 (8th Cir. 1995). The *Mumford* panel reversed a district court's dismissal of a section 1983 claim similar to the one in *Bausworth*, determining that the district court had misconstrued *Bausworth*. 52 F.3d at 758. The *Mumford* panel stated as follows:

> [t]he district court interpreted *Bausworth* to require that the speaker intend his or her speech to reach a public audience, either directly or indirectly, in order for it to be upon a matter of public concern and thus protected under the First Amendment. This interpretation of *Bausworth* unduly narrows the meaning of "public concern" as used in *Connick*.

Id. at 761. The district court's unreported decision in *Mumford*, adopting the same "interpretation" of the law the petitioners believed prevailed in 1991, was issued on June 14, 1994. *See* 52 F.3d at 761.

That the district court in *Mumford* interpreted the law in the same manner as the government officials in this case plainly reveals that the protected status of the speech was not "clearly established" at the time of defendants' actions, three years earlier. The Eighth Circuit in *Mumford* essentially limited *Bausworth* to its facts, explaining that

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the speech *rather than the public's interest in the speech's topic.*" *Bausworth*, 986 F.2d at 1198 (emphasis added) (citing *Connick* and *Cox*). In the decision in this case, however, a different panel of the same Court reached the opposite conclusion – "speech touches on a matter of public concern when it deals *with issues of interest to the community.*" (App. 19) (emphasis added) (also citing *Connick* and *Cox*).

the critical point in *Bausworth* was that the plaintiff was merely "conveying" the speech, rather than espousing her personal opinion. *Id.* Had the protected status of an employee's speech in these circumstances been clearly established either before or after *Bausworth*, the clarification provided in *Mumford* presumably would have been unnecessary.[8]

When three panels from the same circuit reach different conclusions analyzing the same authorities from the Supreme Court and from their own Circuit, and when the district court in one of those cases concludes – as the city officials advanced below – that a government employee's speech was *not* constitutionally protected on facts strikingly similar to those of the instant case, it is manifestly unfair to strip these lay governmental officials of qualified immunity and to subject them to damages liability on the ostensible rationale that the law was "clearly established."

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[8] Indeed, it seems odd to say that the law on this point was "clearly established" in 1991, when no Eighth Circuit case explicitly had addressed this issue. Certainly if it was reasonable for Judge Higginbotham in *Terrell* to rely on *Connick* in determining that whether a public employee's speech was protected depended upon whether the employee was speaking as citizen or as employee, it must have been reasonable for lay members of a city governmental body to reach the same conclusion. Obviously, as set forth above, a significant number of courts have focused primarily on that distinction, including the Eighth Circuit. *See Cox*, 790 F.2d at 672. Moreover, in light of the Tenth Circuit's *en banc* decision in *Koch* finding, on almost identical facts, that the employee's speech was not protected, the city officials here can hardly be faulted for reaching the same conclusion. *See Koch*, 847 F.2d at 1442.

The Eighth Circuit's differing opinions in *Bausworth* and *Mumford* (both of which were decided well after the actions at issue), as well as decisions such as *Terrell* and *Koch*, from the Fifth and Tenth Circuits respectively, compel the conclusion that the law applicable to an employee making a "report in his capacity as City Engineer and pursuant to an assignment from the BOA," (App. 3), to a closed session of the BOA, was anything but "clearly established" in 1991.[9]

Given the divergent interpretations and changing legal landscape created by the cases interpreting the First Amendment over a number of years, the social costs of permitting this suit to be pursued against these individual officials are simply too great. No reasonable official in the present case reasonably could have anticipated in 1991 that the conduct of which these officials are accused

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[9] It is important to note that the relevant question for purposes of a determination of qualified immunity is not whether *Bausworth* or *Mumford* or, for that matter, any other decision is correctly decided. Nor, as the Eighth Circuit incorrectly suggested in this case, is the question whether the court of appeals had rejected defendants' view of *Bausworth* in the *Mumford* decision. *See* (App. 13-14). Rather, the question simply is whether in 1991, prior to either of the Eighth Circuit's decisions, it was objectively reasonable for defendants to believe that when a public employee was speaking in his role as an employee, the speech would not qualify as a matter of public concern, as the Court of Appeals subsequently stated in *Bausworth*. Merely phrasing the inquiry as whether the speech was on "a matter of public concern" bears no relationship to the "objective legal reasonableness" test of *Harlow*, and therefore was inappropriately employed by the court below in this context.

might give rise to liability. Thus, defendants should be entitled to the shield of qualified immunity.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court grant plenary review of both questions presented in this Petition or, alternatively, that the Court summarily reverse the Eighth Circuit's denial of qualified immunity to the individual petitioners, as the Court did in *Hunter v. Bryant*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2611

Ronald Kincade, Plaintiff-Appellee, v. City of Blue Springs, Missouri; Gregory Grounds, Individually, and in his capacity as Mayor, Defendants-Appellants, Frederick Siems, Individually, and in his capacity as City Administrator, Defendant, Russell Clark, in his capacity as Alderman; Evelyn Ericson, in her capacity as Alderman, Defendants-Appellants, Dixie Flynn, in her capacity as Alderman, Defendant, Larry Morgan, in his capacity as Alderman; Emil Spears, in his capacity as Alderman, Defendants-Appellants.	*	Appeals from the United States District Court for the Western District of Missouri

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Submitted: January 13, 1995

Filed: August 26, 1995

Before HANSEN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BOGUE,* Senior District Judge.

HANSEN, Circuit Judge.

Ronald Kincade brought this 42 U.S.C. § 1983 action, claiming that the City of Blue Springs, Missouri, and several City officials (Appellants) violated his First Amendment rights by discharging him from his employment as the City Engineer/Director of Public Works. The district court[1] denied the Appellants' motions for summary judgment. The Appellants appeal, contending that Kincade's speech is not constitutionally protected, they are entitled to qualified immunity, and insufficient evidence of causation exists between Kincade's speech and his termination. We affirm.

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* The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

[1] The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri, adopting the Report and Recommendation of the Honorable Sarah W. Hays, United States Magistrate Judge for the Western District of Missouri.

I.

On June 4, 1990, Ronald Kincade was hired as the Engineer/Director of Public Works for Blue Springs, Missouri (City). Kincade's written job description for this position required him to: represent the City in contacts with other governmental jurisdictions, contractors, and the general public on engineering matters; serve as a member of the City's Zoning and Planning Commission; and meet with and advise the City Administrator, the Mayor, and the Board of Aldermen (BOA) on City construction and development projects. One of the first assignments Kincade received in this position was to provide the BOA with advice as to whether the Waterfield Dam was structurally capable of holding the Adams Dairy Parkway, a road that the City intended to construct in the future.

On August 5, 1991, Kincade gave a verbal status report on the assignment to the Mayor (Gregory Grounds), the BOA (Russell Clark, Evelyn Ericson, Dixie Flynn, Larry Morgan, and Emil Spears), the City Administrator (Frederick Siems) and the City Attorney (Robert McDonald). The comments Kincade made during this verbal status report are the subject of this appeal. Kincade's report was made in an executive session, which is closed to citizens, *see* Mo. Ann. Stat. § 610.021 (Vernon 1995), and the content of his report was not recorded. Kincade made this report in his capacity as City Engineer and pursuant to an assignment from the BOA.

Kincade contends that during the August 5 meeting, he offered opinions on certain issues with respect to the Waterfield Dam. Specifically, he claims that he stated that

in June of 1987 the City paid $62,510 to several local developers, including Bill House, for work that had not yet been completed, and that the dam had not received certain certification as the agreement with the developers required. Kincade also contends that he stated that, due to several inadequacies of the dam which he proceeded to outline, homes and residents downstream from the dam would be in danger of being flooded if the structural integrity of the dam was compromised. Finally, Kincade claims that he also raised the question of legal action against House over issues relating to the dam.[2]

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[2] Kincade claims that he stated the following at the August 5, 1991, meeting:

(1) that the north end of the dam did not have required embankment materials;

(2) that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present, thereby incurring the likelihood of erosion and reduced structural integrity of the dam;

(3) that additionally, the emergency spillway was not constructed of concrete as required by the design plans, thereby contributing to the potential of erosion of the dam;

(4) that the design for the dam had called for a 50 foot width at the top;

(5) that the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway;

(6) that the dam was actually 42 to 49 feet wide as of August 1991;

(7) that the City had paid $62,510 to House and Weatherstone in June of 1987, even though the work had not been completed;

The Appellants contend that Kincade did not make the above statements and, further, that he failed to provide direct answers to their questions about the dam. They assert that Kincade stated that the dam would have to be torn down and rebuilt in order to ensure that it was structurally safe, and they also claim that at no time did Kincade express an opinion concerning the structural integrity of the dam. The Appellants claim that Kincade's report was wholly inadequate for the assignment he was given.

In an executive session of the BOA on October 21, 1991, a majority of the BOA voted to request that Kincade either resign his position or be terminated. At some point during the meeting, City Attorney McDonald explained that under the City ordinance and Missouri law, Kincade was an employee-at-will who served at the pleasure of the BOA and that Kincade's employment could be terminated at any time for any reason, so long as the reason was not unlawful. The parties dispute whether the City Attorney gave this advice before or after the BOA decided to terminate Kincade.

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(8) that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and

(9) that because of the inadequacies of the dam, homes and residents in those homes downstream from the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the above inadequacies.

(Appellee's Supp. Addend. at B-6.)

On October 24, 1991, Kincade's employment was terminated. Kincade then filed this 42 U.S.C. § 1983 action, arguing that he was unlawfully terminated for making comments protected by the First Amendment on three occasions. The district court granted the Appellants' motions for summary judgment with respect to two instances of speech, but denied their motions for summary judgment with respect to Kincade's claim that he was unlawfully discharged because of his speech on August 5, 1991.[3] This appeal followed.

II.

A.

The Appellants contend that they are entitled to summary judgment for several reasons. First, they argue that Kincade's August 5, 1991, speech is not constitutionally protected. Second, they contend that they are entitled to qualified immunity. Finally, they argue that Kincade has presented insufficient evidence that his August 5 speech was the cause of his termination.

We must first satisfy ourselves that we have jurisdiction to address these arguments. A district court's denial of a defendant's summary judgment motion on a claim of qualified immunity is an immediately appealable decision, even though the denial is not a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). In addition, we have held that "when an interlocutory appeal is

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[3] The district court's grant of summary judgment to the Appellants with respect to the other two instances of speech is not challenged in this appeal.

before us under *Mitchell* as to the defense of qualified immunity, we have jurisdiction also to decide closely related issues of law," i.e., pendent appellate claims. *Drake v. Scott*, 812 F.2d 395, 399 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987). However, we must re-examine this principle in light of the Supreme Court's recent holding in *Swint v. Chambers County Comm'n*, 115 S. Ct. 1203 (1995). In *Swint*, a unanimous Court ruled that although the Eleventh Circuit had jurisdiction to immediately review a district court's denial of a police officer's summary judgment motion on qualified immunity grounds, the court of appeals did not have jurisdiction to address an unrelated question of liability presented by the co-defendant County Commission. *Id.* at 1212. The Court emphasized that there was "no 'pendent party' appellate jurisdiction of the kind" that the court of appeals exercised in that case. *Id.* Nevertheless, the Court stated that, "[w]e need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable." *Id.*

Under *Swint*, "pendent appellate jurisdiction might still be appropriate where the otherwise nonappealable decision is 'inextricably intertwined' with the appealable decision, or where review of the nonappealable decision is 'necessary to ensure meaningful review' of the appealable one." *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995) (quoting *Swint*, 115 S. Ct. at 1212). *See also L.S.T., Inc. v. Crow*, 49 F.3d 679, 683 n.8 (11th Cir. 1995) (*Swint* precludes courts from addressing pendent interlocutory claims that are not "inextricably intertwined"

with the collateral order that is properly appealed, or where review of the pendent claim is not necessary to ensure meaningful review of the properly appealed issue); *Kaluczky v. City of White Plains*, 57 F.3d 202, 207 (2d Cir. 1995) (*Swint* limited to claims involving "pendent party" appellate jurisdiction; Court did not narrow scope of pendent appellate jurisdiction, appearing to contemplate pendent appellate jurisdiction over claims that are "inextricably intertwined" or "necessary to ensure meaningful review" of qualified immunity issue).

> [A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal – that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well.

Moore, 57 F.3d at 930. To the extent these definitions of pendent appellate claims qualify as our own "closely related" definition, we adopt them as our own standard.

In this case, our jurisdiction to hear the individual Appellants' qualified immunity claims is without doubt. We conclude that we have jurisdiction to hear the Appellants' claims that Kincade's August 5, 1991, speech is not constitutionally protected because the claims are "inextricably intertwined" with their qualified immunity arguments. Both issues require application of the same constitutional test, and therefore, the question concerning whether the speech is entitled to constitutional protection is "coterminous with, or subsumed in" the qualified immunity issue.

However, we conclude that the Appellants' argument that Kincade has presented insufficient evidence to establish that his August 5, 1991, speech caused his termination is not "inextricably intertwined" with the qualified immunity claims. This causation argument presents significantly different issues. Moreover, in another recent case a unanimous Supreme Court held that "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones,* 115 S. Ct. 2151, 2159 (1995). The district court here decided that there were genuine issues of fact for trial on the causation issue, and thus, we decline to address it.

Finally, although the Appellants dispute what Kincade stated at the August 5, 1991, BOA executive meeting, they argue that even assuming the substance of Kincade's speech is as he claims, such speech is not constitutionally protected and/or they are entitled to qualified immunity. Therefore, for the purpose of this appeal, we will apply the pertinent legal standards to the speech that Kincade claims that he made on August 5, 1991.

B.

The Appellants argue that Kincade's August 5 speech is not constitutionally protected. A public employer "may not discharge an employee on a basis that infringes [upon] that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson,* 483 U.S. 378,

383 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Courts addressing claims by public employees who contend that they have been discharged for exercising their right to free speech must employ a two-step inquiry. *Dunn v. Carroll*, 40 F.3d 287, 291 (8th Cir. 1994). First, the court must determine whether the speech may be described as "speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). If so, the second step involves balancing the employee's right to free speech against the interests of the public employer. *Rankin*, 483 U.S. at 388 (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). The focus is on striking "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [public employer] in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. These two questions are matters of law for the court to resolve. *Dunn*, 40 F.3d at 291. The Appellants argue that Kincade's speech does not touch upon a matter of public concern and, even if it did, Kincade's interest in making this speech did not outweigh the City's interest in maintaining the efficient operation of its enterprise, and therefore, the speech cannot survive the *Pickering* balancing test.

1. Does the speech touch upon a matter of public concern?

The Appellants contend that Kincade's speech does not touch upon a matter of public concern because Kincade made this speech as an employee, within the role and scope of the employer-employee relationship, and

not as a concerned citizen. They note that Kincade spoke on August 5, 1991, pursuant to a work assignment given to him by the BOA and that he spoke in his capacity as City Engineer. They also observe that Kincade never communicated his purported concerns about the dam and the agreements with local developers concerning the dam to the public; rather the speech was made only to the BOA and several other City officials during an executive session of the BOA.

An employee's speech touches upon a matter of public concern when it is a "matter of political, social, or other concern to the community" at large. *Connick*, 461 U.S. at 146. *Connick* emphasized that speech does not touch upon a matter of public concern when the employee speaks "upon matters only of personal interest." *Id.* at 147. In determining whether speech touches upon a matter of public concern, we examine the content, form, and context of the speech, given the record as a whole. *Id.* at 147-48.

> The focus is on the role that the employee has assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution.

Cox v. Dardanelle Pub. Sch. Dist., 790 F.2d 668, 672 (8th Cir. 1986) (footnote and citations omitted).

We conclude that Kincade's August 5, 1991, speech touched upon matters of public concern. He stated that the City had paid local developers a substantial amount of money for work on the dam that had not been done. We generally have held that speech about the use of public funds touches upon a matter of public concern. *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987) (holding speech touched upon a matter of public concern because it "related to the expense of public funds"). *See also Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1199 (8th Cir. 1993) (M. Arnold, J., concurring) ("speech that either directly, or by reasonable inference, criticizes public officials' use of the public's funds lies at the core of the speaker's First Amendment rights"). Kincade's comments were of interest to the community and did not involve issues that were relevant only to the employees of the City. Kincade's comments clearly were not limited to matters of personal interest to him only. We find *Hamer* to be analogous to the fact of this case because, like Kincade, Hamer's speech concerned the expenditure of public funds and also was made in response to an inquiry by a governmental committee. *Hamer*, 831 F.2d at 1402.

More significantly, under the factual assumptions we have made, Kincade stated that homes and residents downstream from the dam could become imperiled if the dam's structural integrity was compromised. These statements concerned potential danger to the community's citizens, which surely is a matter of concern to the public and not of some personal interest solely to the speaker.

Thus, we believe that Kincade's speech concerned matters which can be "fairly considered as relating to matter[s] of . . . concern to the community." *Connick*, 461 U.S. at 146.

The Appellants argue that under *Bausworth*, when a public employee's speech is made in his capacity as a public employee, such speech cannot touch upon a matter of public concern. 986 F.2d at 1198. The *Bausworth* plaintiff's speech involved relaying a complaint from a parent to a school official about the district's decision to charge transportation costs for student field trips, and then informing the parent of the school official's response. *Id.* We stated that in determining whether speech touches upon a matter of public concern, "we focus on the employee's role in conveying the speech rather than the public's interest in the speech's topic." *Id.*

The Appellants seize upon this language and argue that when a public employee speaks in his role as an employee, that speech cannot touch upon a matter of public concern. However, our recent opinion in *Mumford v. Godfried*, 52 F.3d 756 (8th Cir. 1995), rejects the type of broad interpretation of *Bausworth* that the Appellants would have us adopt. In *Mumford*, we stated that *Bausworth* must be considered in light of the particular facts of that case, namely that "the [*Bausworth*] plaintiff's role as messenger was no more protected by the First Amendment than if she had physically delivered the information in writing back and forth between the concerned parents and the school officials." *Mumford*, 52 F.3d at 761. When viewed in that context, it became clear why we stated in *Bausworth* that in determining whether speech touches upon a matter of public concern, " 'we focus on the

employee's role in conveying the speech rather than the public's interest in the speech's topic.' " *Id.* (quoting *Bausworth*, 986 F.2d at 1198). In *Mumford*, we went on to hold that the plaintiff's speech touched upon a matter of public concern because the plaintiff (like Kincade here) was not merely conveying information on behalf of other parties, he was conveying his own personal opinion on an issue. *Id.* Thus here, as in *Mumford*, we find *Bausworth* to be readily distinguishable.

For similar reasons, we find the assumed facts of this case distinguishable from other cases that the Appellants rely upon for the proposition that a public employee's speech is not protected when the individual is speaking in his or her role as a public employee. *See Thomson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 2341 (1993) (plaintiff's conversations with supervisors about filing complaint against County Commissioner involved only matters of internal department policy and did not touch upon public concern; likewise, statements to Agent of the Office of the Inspector General were not protected speech because superiors approved of the contacts and therefore plaintiff was only acting in the course of his employment); *Marquez v. Turnock*, 765 F. Supp. 1376, 1385 (C.D. Ill. 1991) (disgruntled public employee's speech related to primarily internal office issues where speech was made because of employee's dissatisfaction with his employment, and therefore speech was made as employee rather than citizen), *aff'd*, 967 F.2d 1175 (7th Cir. 1992).

We also reject the Appellants' contention that the speech did not touch upon a matter of public concern because it occurred in a closed executive session of the

BOA and was not conveyed to the public. A public employee's First Amendment protection is not lost when the speech is made in private to the employer rather than to the public. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979); *see also Mumford*, 52 F.3d at 761-62 (citing *Givhan*, speech directed only to faculty members touched upon matter of public concern, even though not conveyed to public audience).

The district court correctly concluded that Kincade's August 5, 1991, speech touched upon a matter of public concern.

2. *The Pickering Balancing Test*

Because Kincade's comments on August 5, 1991, touched upon a matter of public concern, we must balance Kincade's free speech rights against the interests of the City. *Pickering*, 391 U.S. at 568. Under the *Pickering* balancing test, the primary focus of the City's interest element is to determine whether the speech undermines "the effective functioning of the public employer's enterprise." *Rankin*, 483 U.S. at 388 (discussing *Pickering*, 391 U.S. at 570-73). Factors relevant in conducting this test are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his duties, or impairs working relationships with other employees. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993). The City bears the burden under the *Pickering* balancing test of establishing permissible grounds for Kincade's discharge. *Id.*

The magistrate judge concluded that the Appellants failed to present any evidence that Kincade's August 5

speech caused disruption in the workplace or inefficiency and delay in the government's services. The magistrate judge concluded, therefore, that it was impossible to balance Kincade's interest in making the speech with the City's interest in regulating the speech because the City produced no evidence to support its assertions. The district court adopted this conclusion.

The Appellants maintain that Kincade's August 5 speech created disruption in the workplace and caused inefficiency in government services because the report was untimely (approximately one year after Kincade was given the assignment), and Kincade's answers to the Appellants' questions were vague and equivocal. The Appellants argue that the magistrate judge overlooked crucial portions of the record that they have presented regarding the negative impact of Kincade's comments on the City's operations.

The Appellants' argument is largely based on bare allegations that the speech caused the City problems; the Appellants have not produced more than minimal specific evidence to support these assertions. Moreover, the minimal evidence the Appellants have offered at best constitutes their version of Kincade's August 5 comments – specifically that Kincade's answers to their questions were vague, evasive, and unsupported. As noted above, given the posture of this case, we must assume that the substance of Kincade's August 5, 1991, speech is as he claims, without considering the Appellants' version.

The Appellants have failed to provide even a scintilla of evidence that Kincade's August 5 statements caused disharmony in the workplace, impaired his ability to

perform his duties, or impaired his working relationships with other employees. Therefore, the district court properly declined to conduct the *Pickering* balancing test.

C.

The Appellants next argue that, even if Kincade's August 5, 1991, speech was constitutionally-protected, they are entitled to qualified immunity. "Public officials are entitled to qualified immunity when their 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Buzek v. County of Saunders*, 972 F.2d 992, 996 (8th Cir. 1992) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, to decide whether public officials are entitled to qualified immunity, a court must determine whether the officials' actions were objectively reasonable in light of the legal rules that were clearly established at the time the action occurred. *Id.* at 639.

The Appellants contend that they are entitled to qualified immunity because, given the fact-intensive nature of the *Pickering* balancing test, the law governing free speech questions for public employees can never be "clearly established." They also claim that Kincade's right to make this speech could not be "clearly established" because the state of the law was uncertain regarding whether a public employee can be speaking on an issue of

public concern when the employee is speaking in his role as an employee.

"[W]hen *Pickering*'s fact-intensive balancing test is at issue, the asserted First Amendment right 'can rarely be considered "clearly established" for purposes of the *Harlow* qualified immunity standard.' " *Buzek v. County of Saunders*, 972 F.2d at 997 (quoting *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992)). "[I]n deciding whether the free speech right is clearly established, it is critical to determine whether the defendants have put the *Pickering* balancing test at issue by producing evidence that the speech activity had an adverse effect on the efficiency of the public employer's operations." *Grantham v. Trickey*, 21 F.3d 289, 294 (8th Cir. 1994). In *Grantham*, we stated that "we do not hold that a simple assertion by the employer that the speech activity affected morale is enough to support a grant of qualified immunity," but where officials present "specific and unrefuted evidence that [the plaintiff's speech] . . . substantially disrupted the work environment," they may be entitled to qualified immunity. *Id.* at 295 n.4.

As noted above, the Appellants have merely asserted that Kincade's speech adversely affected the efficiency of the City's operations and substantially disrupted the work environment without presenting any specific evidence to support this assertion. They therefore have not put the *Pickering* balancing test at issue, and accordingly, we reject their claim that they are entitled to qualified immunity because free speech questions for public employees, as a matter of law, cannot be "clearly established."

We likewise disagree with the Appellants' argument that they are entitled to qualified immunity because the state of the law was unclear with respect to whether a public employee can be speaking on matters of public concern when the speech is made in his capacity as a public employee. At the time of Kincade's termination, the cases made clear that speech touches upon a matter of public concern when it deals with issues of interest to the community. *Connick*, 461 U.S. at 146; *Cox*, 790 F.2d at 672. As noted above, Kincade's speech clearly addressed issues that the public would be interested in, not issues that have some personal interest only to Kincade.

The Appellants also argue that they are entitled to qualified immunity because they relied on the advice of counsel in deciding to terminate Kincade. Reliance on the advice of counsel is a factor to be weighed in assessing whether a public official is entitled to qualified immunity. *See Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir. 1984) (defendants acted in good faith with respect to termination decision in relying on advice of counsel). However, we conclude that *Tubbesing* is not relevant at this stage of the case because we agree with the magistrate judge that a factual dispute remains about whether counsel's advice was given before or after the BOA voted to terminate Kincade. Moreover, a factual dispute exists about whether counsel was informed that Kincade was being terminated because of his August 5, 1991, speech, and therefore, counsel's advice can hardly be said to be tailored to the facts. *See V-1 Oil Co. v. State of Wyoming Dept. of Envtl. Quality*, 902 F.2d 1482, 1489 (10th Cir.) (in determining whether defendant was entitled to qualified immunity because he relied on the advice of counsel,

court should consider whether counsel had been given complete information about facts giving rise to controversy), *cert. denied*, 498 U.S. 920 (1990). Therefore, the district court committed no error in denying the Appellants qualified immunity for relying on the advice of counsel.

III.

For the reasons enumerated above, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2611WMKC

Ronald Kincade,	*	
	*	
Appellee,	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Rehearing
City of Blue Springs, et al.,	*	En Banc
	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 12, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Ronald Kincade, Plaintiff,	)	No. 92-0066-CV-W-2
vs.	)	
City of Blue Springs, Missouri, et al., Defendants.	)	

ORDER

(Filed May 19, 1994)

Pending before the Court are the following motions:

Motion for partial summary judgment, filed by plaintiff on August 18, 1993; and

Motion for summary judgment, filed by defendants on August 19, 1993;

On January 10, 1994, Magistrate Sarah W. Hays entered a report and recommendation which recommended:

(1) The motion for summary judgment filed by defendants City of Blue Springs, Grounds, Clark, Ericson, Morgan and Spears be granted as to plaintiff's first and third claims of protected speech; and be dismissed against the City and against defendants Grounds, Clark, Ericson, Morgan and Spears in both their individual capacities as and [sic] aldermen. In the alternative, the magistrate recommended that defendants Grounds, Clark, Ericson, Morgan and Spears be granted summary judgment, individually, as to plaintiff's first and third

instances of allegedly protected speech on the basis of qualified immunity;

(2) Defendants' motion for summary judgment be denied as to plaintiff's second claimed instance of protected speech;

(3) Defendant Siems' motion for summary judgment be granted; and be dismissed against defendant Siems both individually and in his capacity as City Administrator. In the alternative, the magistrate recommended that defendant Siems be granted summary judgment, individually, as to plaintiff's first and third instances of allegedly protected speech on the basis of qualified immunity;

(4) Plaintiff's motion for summary judgment be denied.

Magistrate Hays issued a supplemental report and recommendation on April 6, 1994, which recommended that the Court enter an order denying defendants' motion for summary judgment on plaintiff's second claim of protected speech.

The Court, after independent review of the record and applicable law, adopts and incorporates by reference herein, the magistrate's findings of fact and conclusions of law. Because of the thoroughness of the magistrate's report and recommendation, there is no useful purpose in this Court filing a separate order. Therefore, the Court finds that:

(1) Plaintiff's motion for summary judgment must be denied;

(2) Defendant Siems motion for summary judgment must be granted;

(3) Defendants City, Grounds, Ericson, Morgan and Spears' motion for summary judgment must be granted as to plaintiff's first and third claims of protected speech, and denied as to plaintiff's second claim of protected speech.

Plaintiff has requested that this Court certify certain issues for an interlocutory appeal pursuant to 28 U.S.C. Sec. 1292. In order to rule on that request, the Court requires additional briefing. The parties are to limit said briefing to five pages or less. Plaintiff shall file his brief within 10 days of this order; defendants shall file their brief within five days of plaintiff's brief; and plaintiff has three days thereafter to respond.

Accordingly, it is

ORDERED that the Magistrate's proposed findings of fact and conclusions of law, filed on January 10, 1994, and April 6, 1994, are hereby adopted and incorporated herein by reference. It is further

ORDERED that

(1) Plaintiff's motion for summary judgment is denied;

(2) Defendant Siems motion for summary judgment is granted;

(3) Defendants City, Grounds, Ericson, Morgan and Spears' motion for summary judgment is granted as to plaintiff's first and third claims of protected speech, and denied as to plaintiff's second claim of protected speech.

(4) Plaintiff and defendants are to provide suggestions in support of, or opposition to a request for an interlocutory appeal as required by this order.

/s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States
District Judge

Dated: May 19, 1994
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RONALD KINCADE, Plaintiff,	)	
v.	)	Case No. 92-0066-CV-W-2
CITY OF BLUE SPRINGS, MISSOURI, et al., Defendants.	)	

REPORT AND RECOMMENDATION

(Filed Jan. 10, 1994)

Plaintiff Ronald Kincade, the former City Engineer/ Director of Public Works for the city of Blue Springs, Missouri, filed suit under 42 U.S.C. § 1983 against the City of Blue Springs, four members of the City's Board of Aldermen, Russell Clark, Evelyn Ericson, Larry Morgan and Emil Spears, the Mayor of the City, Gregory Grounds, and the City Administrator, Frederick Siems, alleging that defendants violated his constitutional right to free speech by terminating his employment with the City.

Plaintiff and defendants have filed motions for summary judgment. Defendants seek summary judgment on the bases that: (1) plaintiff cannot allege the essential elements of a First Amendment claim; (2) each of the individual defendants are entitled to qualified immunity; and (3) defendant Siems did not cause any violation of plaintiff's First Amendment rights. Plaintiff requests that

the Court rule as a matter of law that plaintiff's statements made during the course of his employment addressed matters of public concern.

I. STANDARDS FOR EVALUATING A MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party has the initial burden of showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

The parties were unable to agree on most of the facts of this case. However, many of the issues the Court must determine are legal issues that would result in the same outcome no matter which version of the facts is used. The Court will set out those facts used in its decision in the discussion of each issue and will indicate whether those specific facts are agreed upon by the parties or whether they are in dispute.

II. FIRST AMENDMENT CLAIMS

Plaintiff claims First Amendment protection for three separate areas of "speech:" (1) Enforcement of City ordinances under his direction throughout the term of his employment for the City;[1] (2) Comments concerning Waterfield Dam at the August 5, 1991 meeting of the Board of Aldermen;[2] and (3) Comments made at the Planning and Zoning Commission meeting of October 14, 1991.[3]

A. Applicable Legal Standards

The legal theory underlying First Amendment retaliation cases is that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). *See also Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987). Three issues must be resolved in First Amendment retaliation cases: (1) whether the plaintiff's speech was "protected activity" under the First Amendment; (2) whether the plaintiff's protected activity was a motivating or substantial factor in the defendant's decision to terminate the plaintiff; and (3) whether the defendant would have

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[1] (Plaintiff's Motion for Partial Summary Judgment at Ex. B, ¶ 10; First Amended Complaint at ¶ 25)

[2] (Plaintiff's Motion for Partial Summary Judgment at Ex. B, ¶ 18; First Amended Complaint at ¶ 44)

[3] (Plaintiff's Motion for Partial Summary Judgment at Ex. B, ¶ 28; First Amended Complaint at ¶ 62)

taken the same action irrespective of the plaintiff's protected activity. *See Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987).

The issue of whether a plaintiff's speech is protected presents a question of law for the court. *See Lewis v. Harrison School Dist. No. 1*, 805 F.2d 310, 313 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987). The determination of whether speech is protected under the First Amendment depends upon an evaluation of: (1) whether the plaintiff's speech addressed a matter of "public concern;" and (2) whether the plaintiff's interest in commenting on matters of public concern is outweighed by the government's interest in rendering efficient services to its constituents.

B. Did Plaintiff's Speech Address A Matter of Public Concern?

In evaluating the Motions for Summary Judgment filed by both plaintiff and defendants, the threshold inquiry for the Court is whether plaintiff's alleged instances of First Amendment speech are in fact speech addressing matters of "public concern."

1. Enforcement of City Ordinances

Defendants argue that plaintiff's claimed enforcement of City ordinances is not speech for the following reasons: (1) plaintiff has failed to identify with specificity the communications he claims warrant protection under the First Amendment; (2) the claimed enforcement of regulations represents a generalized course of conduct,

not speech; and (3) any enforcement of regulations was done in plaintiff's role as City Engineer, and not as a citizen speaking on a matter of public concern.

Defendants' [sic] rely on *Dennison v. County of Frederick, Va.*, 921 F.2d 50 (4th Cir. 1990), cert. denied, 111 S. Ct. 2828 (1991), to support their argument that enforcement of ordinances does not constitute protected conduct. Plaintiff in *Dennison* alleged he was constructively discharged from his position as a building inspector by his supervisors who urged him to relax his strict enforcement of the building code. Dennison further alleged his department was reorganized so he could not tell the secretaries what to do, but had to go through a floor coordinator who was not a member of his department. *Id.* at 52. The Fourth Circuit found that Dennison failed to demonstrate that speech or some expressive conduct was involved or that his speech was protected. *Id.* at 53. The *Dennison* court recognized that "speech" does not have to be spoken to be protected under the First Amendment. However, the court concluded that:

> Dennison never evinced an "intent to convey a particularized message . . . " *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Since Dennison cannot identify any particular speech, symbolic or otherwise, for which he was punished, we hold that, as a matter of law, his First Amendment right to freedom of speech could not have been violated.

Dennison, 921 F.2d at 53.

The *Dennison* court recognized that although safety of public buildings could be considered important to the

public welfare, Dennison never complained to his supervisor that office policies regarding the building code were unsafe. Further, Dennison did not identify any specific conduct by his supervisor which resulted in an unsafe or unlawful enforcement of the building code. Although Dennison's allegations might be viewed as being of public interest, the court concluded that when considered in the context of what actually occurred with the office reorganization and plaintiff's probation, they are "more properly viewed as essentially a 'private' matter between employer and employee." *Id.* at 54.

Subsequently, the United States District Court for the Eastern District of Virginia in *Roper v. County of Chesterfield, Va.*, 807 F. Supp. 1221 (E.D. Va. 1992), denied a motion to dismiss in a case in which plaintiff Roper, a building inspector, alleged that his refusal to pass substandard work for particular contractors constituted protected speech. In comparing Roper's claims to those of Dennison, the court concluded that:

> Roper's claim is fundamentally different. He alleges not some general dispute with his supervisors over overall building code enforcement, but rather that his refusal to approve without question the work of the Contractor Defendants at Hodder's behest prompted his termination. The speech or expressive conduct at issue in Roper's case is his refusal to pass the Contractor Defendants' substandard work despite his supervisor's alleged direction to do so. This is not a "general course of conduct, but a specific response to an alleged order issued by

> Roper's supervisor to ignore building codes enacted to protect public safety.

Id. at 1225.

In response to defendants' motion for summary judgment, plaintiff Kincade alleges that the essence of his argument is that he did enforce ordinances, he did report on the Waterfield Dam at an August 5, 1991 meeting of the Board of Aldermen and he did respond to questions at the Planning and Zoning meeting. (Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 72) Plaintiff's statements on August 5, 1991 and October 14, 1991 are the subject of other instances of alleged protected speech and will be examined subsequently.

In support of his argument that by enforcing ordinances he engaged in a course of conduct that constituted protected expression, plaintiff relies on cases such as *Spence v. Washington*, 418 U.S. 405 (1974), and *Texas v. Johnson*, 491 U.S. 397 (1989). (Plaintiff's Reply Suggestions in Support of Plaintiff's Motion for Partial Summary Judgment at 38). However, both of these cases involved the use of a national symbol, the flag, to convey a symbolic message. In *Spence* plaintiff's display of an upside-down American flag with a peace symbol taped to it was found to communicate that America stood for peace. 418 U.S. at 409-11. The burning of an American flag at the conclusion of a political rally during the Republican National Convention while Ronald Reagan was being renominated for President was found to be an expression of an overtly political nature that was both intentional and overtly apparent in *Texas v. Johnson*. 491 U.S. at 406.

The *Johnson* court found that the conduct was a form of expression only after considering whether there was an intent to convey a particularized message and the likelihood that the message would be understood by those who viewed it. *Id.* at 404.

Both parties apparently agree that part of plaintiff's job responsibilities included the enforcement of ordinances. (*See* Plaintiff's Motion for Partial Summary Judgment at Ex. A; Defendants' Memorandum In Support of Motion for Summary Judgment at 26) As to plaintiff's general claim that he sought to enforce ordinances, the Court finds that this case is more akin to *Dennison* than to *Roper.* Other than statements made by plaintiff on August 5, 1991 and October 14, 1991, plaintiff has failed to specify what ordinances he sought to enforce or in what context he sought to enforce them. Thus, as in *Dennison,* there is no evidence from which this Court could find the hallmarks of First Amendment expression, *i.e.* that plaintiff attempted to convey a particularized message or the likelihood that the message would be understood by those who viewed it.

During oral argument on the summary judgment motions, plaintiff's counsel indicated that the specific speech or protected activity in connection with the enforcement of ordinances was set forth in paragraph five

of the Statement of Facts in support of plaintiff's summary judgment motion.[4] That paragraph alleges:

> 5. That thereafter he reorganized the Department of Public Works/City Engineer and put in place procedures to ensure the orderly handling of projects by his department, and also procedures to ensure that the Subdivision ordinances were in fact consistently interpreted by him and his Department and followed by developers and builders in the City. (See Paragraph 5 of Affidavit attached as Exhibit B).

(Plaintiff's Suggestions in Support of Motion for Partial Summary Judgment at 3) Plaintiff's affidavit also alleges:

> 6. That with the institution of the new procedures in Engineering to ensure the orderly handling of projects and consistent enforcement of Subdivision ordinances came "complaints"

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[4] At the oral argument held on October 6, 1993, plaintiff's counsel stated:

> I think that paragraph five is the nitty-gritty of the enforcement proceedings. The day after he reorganized the Department of Public Works/City Engineer, and put in place procedures to ensure the orderly handling of projects by his department, and also procedures to ensure that the subdivision ordinances were, in fact, consistently interpreted by him . . . and his department, and followed by developers and builders in the city.
>
> That is the course of conduct that he is alleging is his First Amendment expression in the first instance. Putting in place procedures, and showing the ordinances were, in fact, consistently interpreted by him. That, to me, is an expression, in and of itself. . . . That is the course of conduct, paragraph five.

(Tr. at 10-11)

> from developers and builders that the City and particularly Engineering was "not responsive" to the developers and builders, that Engineering was "causing delays" in the procurement of permits; that Engineering was "changing interpretations;" that Engineering was "not cooperative;" that Engineering "required changes to plans on multiple occasions."
>
> 10. That I contend such complaints were the result of my actions in enforcing the City's ordinances as required by the BOA, Grounds and Siems and that therefore my actions in enforcing the City ordinances constitute a First Amendment expression deserving of First Amendment protection.

(*Id.* at Ex. B)

As pled, these paragraphs suggest that the alleged protected expression may actually be the reorganization of the department, not the enforcement of ordinances. However, even if the "expression" is characterized as the departmental reorganization, plaintiff is not entitled to prevail. Claims arising from the general reorganization referred to in paragraph five appear to be the type of issue relating to internal office procedure which courts have consistently viewed as a private matter between employer and employee, not a matter of public concern. *See* cases cited at pages 14 n.7 and 15-16, *infra*.

As there has been no showing that plaintiff's alleged course of conduct constituted "expression" within the meaning of the First Amendment or that even if it could be categorized as "expression" it related to a matter of public concern, the Court recommends that defendants'

Motion for Summary Judgment be granted as to plaintiff's first claim of protected speech, enforcement of City ordinances or departmental reorganization.

2. The August 5, 1991 Meeting

Plaintiff's second instance of claimed protected speech occurred on August 5, 1991. Defendants seek summary judgment on this claim. They describe the August 5, 1991 speech in the following terms: "by bringing to the attention of the BOA in August of 1990 [sic] that there were several problems with Waterfield Dam of public concern involving safety." (Defendants' Memorandum in Support of Motion for Summary Judgment at 26)

Plaintiff has also sought summary judgment on this claim, alleging that as a matter of law he is entitled to First Amendment protection for the statements he made on August 5, 1991. Plaintiff alleges that at the August 5, 1991 meeting, he informed the Board of Aldermen that there were several problems of public concern with Waterfield Dam involving safety. Specifically, plaintiff contends that he discussed the following issues:

> 18. That on August 5, 1991 at a meeting of the BOA, I (plaintiff Kincade) presented the problems with the dam, including, but not limited to:
>
> a. that the north end of the dam did not have required embankment materials;
>
> b. that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present thereby

incurring the likelihood of erosion and reduced structural integrity of the dam;

c. that additionally, the emergency spillway was not constructed of concrete as required by the design plans thereby contributing to the potential of erosion of the dam;

d. that the design for the dam had called for a 50 foot width at the top; the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway; the dam was actually only 42 to 49 feet wide as of August 14, 1991;

e. that the City had paid $62,510 to House and Weatherstone in June of 1987 even though the work had not been completed;

f. that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and

g. that because of the inadequacies of the dam, that homes and residents in those homes downstream of the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the aforesaid inadequacies.

(Plaintiff's Suggestions in Support of Motion for Partial Summary Judgment at Ex. B).[5]

While denying that plaintiff made each of the above statements, defendants argue that plaintiff's conduct in a closed executive session reporting the results of an investigation specifically assigned to him by the Board of Aldermen was undertaken in plaintiff's role as City Engineer.[6] Defendants claim that even if the speech may be of some potential interest to the public, the speech can only be a matter of public concern when a public employee speaks as a concerned citizen and not when the employee speaks as an employee. (Defendants' Memorandum in Support of Motion for Summary Judgment at 27)

Defendants cite cases such as *Bausworth v. Hazelwood School District*, 986 F.2d 1197 (8th Cir. 1993), *Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2341 (1993), and *Wilson v. City of Littleton, Colorado*, 732 F.2d 765 (10th Cir. 1984), for the proposition that speech is not protected by the First Amendment when an employee speaks as an employee and not as a citizen. Defendants seem to suggest that because plaintiff's speech at the August 5, 1991 meeting related to an assigned investigation, it must be characterized as unprotected speech of an employee and not that of a concerned citizen on a matter

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[5] These same facts set forth in paragraph 18 of plaintiff's factual statement in support of his motion for partial summary judgment are included in paragraph 67(a) through (g) of plaintiff's opposition to defendants' motion for summary judgment.

[6] For purposes of considering defendants' motion for summary judgment, the Court will assume that plaintiff made the statements contained in paragraph 18.

of public concern. As the following analysis suggests, the cases relied on by defendants do not support the proposition that plaintiff's statements concerning the Waterfield Dam are not entitled to First Amendment protection merely because plaintiff had some responsibility for investigating and reporting on these issues as City Engineer.

For example, in *Bausworth v. Hazelwood School District*, 986 F.2d 1197 (8th Cir. 1993), plaintiff Bausworth claimed that the school district terminated her in retaliation for certain speech involving the district's decision to charge parents for the bus transportation costs of a student field trip. The court found that Bausworth, a school bus driver, had received a question from a student's parent, repeated the question to her superior, received the superior's response and repeated the answer to the parent. *Id.* at 1199. The court concluded that:

> Bausworth engaged in nothing more than a job-related chore to get information for a student's parent. Bausworth neither espoused a personal opinion that the charge was incorrect nor sought to make a public issue of any school district mistake.

Id.

Unlike the plaintiff in *Bausworth*, plaintiff Kincade's statements at the August 5, 1991 meeting of the Board of Aldermen cannot be characterized as merely conveying questions to a superior, obtaining information from that superior and relaying them to a third party. The statements of plaintiff Kincade were developed as the result of his investigation, expressed his personal opinions and pointed out that funds had been expended by the City

without work being done. As Circuit Judge Morris Arnold stated in his concurring opinion in *Bausworth*:

> In my view, speech that either directly, or by reasonable inference, criticizes public officials' use of the public's funds lies at the core of the speaker's First Amendment rights.

Id.

Likewise, *Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2341 (1993), another case relied on by defendants, is easily distinguishable. Plaintiff Thomson, a fraud investigator for the Erie Department of Human Services, was responsible for investigating suspected fraud by recipients of public funds in programs administered by the Department. After he was hired, Thomson commenced an investigation of a County Commissioner, William Scheid. During the course of the investigation, Thomson expressed an interest in personally filing a complaint against Scheid. Thomson had a conversation with his supervisor in which he was reminded that he was bound by Department confidentiality rules. Further, he was warned not to act without following Department policies and procedures. Thomson did not file a complaint. He did contact the Office of Inspector General, United States Department of Health and Human Services, with the approval of his supervisor.

The *Thomson* court concluded that Thomson's conversations with his supervisors about the investigation, their reminder that his investigation was confidential and their warning not to pursue the matter without going through appropriate channels related only to matters of internal

department policy. Thus, these conversations could not be categorized as plaintiff speaking out on matters of public concern. *Id.* at 1021.[7] Unlike plaintiff Thomson's conversations, plaintiff Kincade's speech on August 5, 1991 cannot be labeled as merely a discussion between plaintiff Kincade and his supervisors concerning internal policies. Plaintiff Kincade's comments, although made in his capacity as City Engineer, address matters of public concern, including the possible misuse or misspending of City funds for work on a dam that was supposedly never completed and which created possible dangers downstream from erosion.

Wilson v. City of Littleton, Colorado, 732 F.2d 765 (10th Cir. 1984), is also factually distinguishable from this case. Plaintiff Wilson, a police officer with the City of Littleton, was fired as the result of his refusal to obey an order to remove the black shroud from his badge which he wore to mourn the death of a policewoman in another town. *Id.* at 766. The *Wilson* court recognized that in order for speech to be a matter of public concern, it is not enough that the subject matter of the speech could, in certain circumstances, be a topic of general interest to the public.

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[7] Two other cases cited by defendants involve employees whose speech involved internal office policies which was, thus, not protected by the First Amendment. *See Assa' Ad-Faltas v. Commonwealth of Va.*, 738 F. Supp. 982, 986 (E.D. Va. 1989), *aff'd*, 902 F.2d 1564 (4th Cir. 1990) (allegation that plaintiff, director of a health district, was fired for challenging medical protocols selected by two defendants amounts only to a challenge by an employee to internal office policy); *Marquez v. Turnock*, 765 F. Supp. 1376, 1384-85 (C.D. Ill. 1991), *aff'd*, 967 F.2d 1175 (7th Cir. 1992) (plaintiff's three major conflicts with his supervisor involved mainly internal office decisions)

For the speech to be of public concern, what is *actually said* must itself be of public concern. *Id.* at 769. Plaintiff Wilson claimed First Amendment protection on the basis that the black shroud on his badge served as a symbolic expression of his grief. The court found that while the death of a police officer could conceivably be a topic of general interest to the public, Wilson's personal feelings of grief were not a matter of public concern within the meaning of the First Amendment. *Id.*

Defendants' argument that plaintiff Kincade's speech was "simply performed within the scope of his role as City Engineer and not as a public citizen"[8] misconstrues the applicable standard for determining if speech is constitutionally protected. As the court recognized in *Marquez v. Turnock*, 765 F. Supp. 1376 (C.D. Ill. 1991), *aff'd*, 967 F.2d 1175 (7th Cir. 1992), another case relied on by defendants, an employee does not relinquish his First Amendment rights when he goes to work for the government, but he implicitly agrees that when he is speaking on matters of public concern, his right to speech must be balanced against the government's interest in running an efficient office. *Id.* at 1384. Thus, the threshold inquiry is whether the government employee's statements or actions involved an issue of public concern. The Tenth Circuit has recognized that "[s]peech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of city officials, in terms of content, clearly concerns matter of public import." *Patrick v. Miller*, 953 F.2d 1240, 1247-48 (10th Cir. 1992).

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[8] (Defendants' Memorandum in Support of Motion for Summary Judgment at 29-30)

The focus is, thus, on the role the employee has assumed in making the speech. If an employee speaks as a concerned citizen to inform the public that the state institution is not properly discharging its duties or is engaged in malfeasance or nonfeasance, the speech is of public concern. However, if the employee speaks on internal policies or practices, the expression is probably not of public concern. *See Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). If the issues are of public concern, the employee's interest as a citizen in commenting upon them must be balanced against the government's interest as an employer in an efficient work place. *Id.* at 1384. *See also Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990) (holding that public employee's criticism of employer's promotion process was "protected activity"); *Darnell v. Ford*, 903 F.2d 556 (8th Cir. 1990) (ruling that state police officer's support of a certain candidate for the position of Highway Patrol Superintendent was "protected activity"); *Hamer v. Brown*, 831 F.2d 1398 (8th Cir. 1987) (ruling that plaintiff's speech criticizing expenditure of public funds was "protected activity"); *Lewis v. Harrison School Dist.*, 805 F.2d 310 (8th Cir. 1986) (ruling that principal's criticism of school superintendent over transfer of principal's wife was "protected activity"); *Cox v. Dardanelle School Dist.*, 790 F.2d 668 (8th Cir. 1986) (ruling that teacher's criticism of school administration was "protected activity").

If plaintiff Kincade can prove he made the statements set forth above at pages 10 and 11, the speech would address matters of public concern, *i.e.* the construction of a dam, the use of City money to pay for improvements to the dam that may not have been made and dangers of

downstream damage from the inadequacies in the dam. Thus, the Court cannot accept defendants' argument that plaintiff's August 5, 1991 speech could not be a matter of public concern under any circumstances.

Defendants also suggest that summary judgment in their favor is warranted because:

> neither the public nor press were present for the August 5, 1991 Executive Session, and whatever plaintiff may have said in the course of that meeting he did not "bring it to the attention of the public."

(Defendants' Reply in Support of Motion for Summary Judgment at 9) However, the Supreme Court has specifically found that neither the First Amendment nor case interpretation thereof suggest that First Amendment protections are lost to the public employee who communicated privately with his employer. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 413-416 (1979); *Derrickson v. Board of Educ.*, 703 F.2d 309, 316 (8th Cir. 1983) (recognizing the First Amendment right of a public employee to privately express to his supervisors his criticism of certain educational practices).

Having determined that defendants are not entitled to summary judgment on plaintiff's August 5, 1991 speech, the Court must next consider plaintiff's motion for summary judgment as it relates to this same speech. A review of both plaintiff's and defendants' filings demonstrates that a considerable dispute exists over the exact words spoken on August 5, 1991. Defendants deny that

plaintiff made many of the specific statements set forth above and admit only the following:

> [D]efendant admits that in an executive session of a BOA meeting on August 5, 1991, in response to inquiries from Grounds, Siems, and the BOA, Kincade made a presentation in the course of which defendant recalls that Kincade shared opinions that it appeared that the dam was not as wide as the City had contracted for it to be built, and that the auxiliary spillway was not constructed of concrete. Additionally, defendant recalls that Kincade said that if the dam failed, there was a risk of downstream property damage. Kincade did not, however, offer any opinion as to the probability or likelihood of such a failure. Rather, Kincade stated that he could not say whether the dam was safe or unsafe, and that the only way to know would be to drain the dam, tear it down, and rebuild it.

(Defendants' Supplemental Submission at 17) *See also* Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment at 12 and Defendants' Supplemental Submission at 15-22.

The speech which is set forth above at pages 10 and 11 is controverted in many respects. Thus, because the content of plaintiff's speech on August 5, 1991 is in dispute, the Court cannot grant plaintiff summary judgment on this issue and rule as a matter of law that plaintiff's speech on August 5, 1991 was a matter of public concern. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement as

revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 146-47 (1983). Here, the content is in dispute.

The Eighth Circuit has recognized that any underlying factual dispute concerning the nature and substance of a plaintiff's speech becomes a factual question that should be decided by the jury along with the issue of whether the speech created disharmony in the work place. The trial court is then required to combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected. *See Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993). Therefore, it is recommended that using the procedure identified in *Shands*, the District Court submit special interrogatories to the jury requiring the jury to determine what was said on August 5, 1991. After that factual issue has been resolved by the jury, the District Court will be able to determine whether the speech addressed a matter of public concern.

3. The October 14, 1991 Planning And Zoning Meeting

Plaintiff's lawsuit also seeks First Amendment protection for statements made during an October 14, 1991 meeting of the Planning and Zoning Commission. Defendants claim that in previous filings plaintiff described his speech at the October 14, 1991 meeting as follows:

> upon inquiry by the Planning and Zoning Commission on October 14, 1990 [sic], stating that the reason there were problems with Waterfield Dam was because of the inaction of the Mayor and the BOA.

(Defendants' Memorandum in Support of Summary Judgment at 30) Defendants contend that no such words were spoken at the October 14, 1991 meeting. (*Id.*) In response to defendants' motion for summary judgment, plaintiff sets forth his version of the facts relating to his speech both before and during the October 14, 1991 meeting. (*See* Plaintiff's Opposition to Defendants' Motion for Summary Judgment at 58-61, ¶¶ 78-85; Plaintiff's Suggestions In Support of Motion for Partial Summary Judgment at 17; and Plaintiff's Ex. A at ¶¶ 26-28) A recording was made of the October 14, 1991 meeting and the parties have stipulated that the transcript of the October 14, 1991 meeting may be attached to and referred to in any dispositive motions. (*See* Defendants' Motion for Summary Judgment at Ex. 28)[9]

Having reviewed the speech of plaintiff Kincade contained in defendants' Ex. 28, the Court finds that although the topic under discussion, subdivision water management plans, could conceivably be a matter of public concern, what was actually said by the plaintiff does not involve a matter of public concern. Plaintiff's speech on October 14, 1991 primarily involved explaining why

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[9] Plaintiff has raised a hearsay objection to defendants' use of that transcript to set forth what individuals other than plaintiff said on October 14, 1991. However, given the parties' stipulation, the Court's belief that the statements of these other individuals fall within exceptions to the hearsay rule, including present sense impression, and plaintiff's repeated use of the "Stipulated Transcript In Its Entirety" in his rebuttal of defendants' statement of uncontroverted material facts, the Court will consider the entire transcript of October 14, 1991 as requested by plaintiff. (*See* Plaintiff's Reply to Defendants' Statement of Uncontroverted Material Facts at ¶¶ 29-30, 34-36)

his department changed its recommendation for handling the storm water management plans of two subdivisions. In explaining his change in position, plaintiff was responding to questions and concerns from the developers and commission members about the timing of the recommendation change and why developers were not notified in advance. In responding to questions, plaintiff was largely seeking to avert personal blame.

Item 5 on the Planning and Zoning commission's agenda for its October 14, 1991 meeting was final plat approval for Quail Walk West, first plat, lots 1 through 6. The Director of Community Development, Tom Kuntz, began the discussion and explained that at a meeting of representatives of various city departments on October 2, 1991, it had been determined that it was impractical to provide on-site detention of storm water for these lots and that the developer should escrow funds for off-site improvements that the City would determine were appropriate at a later date. This information had been communicated to the developers of the lots. The Assistant City Engineer had been present at this meeting. Mr. Kuntz then advised that in discussions with plaintiff late in the afternoon of October 14, 1991, it had been determined that alternatives other than escrowing funds for storm water management needed to be examined. Plaintiff then stated:

> Mr. Chairman, what has transpired is a late this afternoon meeting concerning this idea that we had hoped would solve the storm water management plan issue provides other concerns for the City that were not considered at the time of this review and I think because of the current

> status of the Waterfield Dam and the uncertainty as to the improvements that are needed at that site which is the ultimate area that these lots would drain to, it becomes inappropriate for the City to accept an escrow amount in lieu of the standards which would require on-site detention or other acceptable means of storm water management. At this point, I don't have an answer. I do know that it is a problem and one we are pursuing to try to resolve. There could possibly be some agreements worked out between the developer of Waterfield Dam and developers of this property that might allow for those improvements to be made that could handle this storm water problem that may or may not exist from these lots. And I think at this time I don't have an answer but I do think we need to withdraw the recommendation for an escrow deposit.

(Defendants' Ex. 28 at 1-2) After this statement, plaintiff was asked "Ron, how is it going to be approved, if there isn't any storm water management?" To which plaintiff responded:

> I think the removing this item would also necessitate adding a provision for an alternative storm water management plan to be submitted. There again, that may require the developer to do some coordinating with the Waterfield Dam owner in terms of what improvements might be necessary there. It might involve other alternatives. I really can't say without going through the design of that plan. But I think it is still the subdivision requirements that a storm water plan be submitted and approved is still existing on this plat.

(*Id.* at 2) When asked subsequently how his recommendation would be worded, plaintiff replied, "My recommendation would have to be that the plat is approved subject to and a storm water management plan being submitted and approved." (*Id.* at 5)

The content of these discussions does not address the concerns about Waterfield Dam which plaintiff allegedly expressed on August 5, 1991 and which the Court found, if accepted by the jury, could constitute a matter of public concern. The speech of October 14, 1991 related only to whether the storm management plan requirements for certain lots could be satisfied by the escrow of funds. The Supreme Court has recognized that:

> when employee expression cannot be fairly considered as relating to any matter of political social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Connick v. Myers, 461 U.S. 138, 146 (1983). The content of plaintiff Kincade's speech does not relate to political, social or other community concerns so as to require a balancing of plaintiff's right to speak out on issues of public concern against the City's interest in promoting the efficiency of the public services it performs. The *Connick* court also noted that the precedents which led to the balancing approach in *Pickering v. Board of Education*, 391 U.S. 563 (1968), are rooted in the recognition of the right of public employees to participate in public affairs.

The First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick*, 461 U.S. at 145. The emphasis in *Pickering* on a public employee's rights as a citizen in commenting upon matters of public concern is significant. Speech which involves the internal operations of a governmental entity has consistently been held to be unprotected by the First Amendment. *See Marquez v. Turnock*, 765 F. Supp. 1376, 1384 (C.D. Ill. 1991), *aff'd*, 967 F.2d 1175 (7th Cir. 1992).

The context in which speech is made is also a factor to be considered in determining whether the speech is of public concern. Many of plaintiff Kincade's statements during the October 14, 1991 meeting relate to the functioning of his department and the timing of his decision that the plats needed to be modified prior to approval. Many of these statements were made in response to questions. For example, Commissioner Kathy Starke questioned:

> I would like to know what changed between the meeting with Mr. Flori on October 2nd and tonight. I mean why did why did [sic] three weeks pass by and the first this developer hears is when he gets here tonight? I am not sure who can answer that.

(Defendants' Ex. 28 at 9) A representative of one of the developers, Dave Jeter, also spoke. Plaintiff Kincade then responded to Mr. Jeter's comments which plaintiff interpreted as stating that no plan could be submitted that would satisfy the City Engineer. (*Id.* at 13)

Items 6 and 7 on the Planning Commission's agenda for October 14, 1991 related to the approval of plats for

the Foxtrail subdivision and involved the same issue as Quail Walk West Subdivision, *i.e.*, the Engineering Department's determination that a plan for storm water management other than the escrow of funds needed to be submitted. (*Id.* at 20-21) Plaintiff Kincade spoke first to explain and clarify the ordinance's requirement:

> No I think you're misunderstanding. The issue of storm water management is that the ordinance requires that a new development handle any additional run-off that will occur after the development that did not occur before the development.

(*Id.* at 23) Plaintiff then outlined the calculations that had been done to identify the runoff that would occur, explained that the next step was to determine the volume of water to be detained during a storm and concluded that more work would have to be done and more calculations made. (*Id.* at 23-24) Plaintiff was also required to respond to criticisms by another planning commissioner that "It just seems to me we could have dotted our i's and crossed our t's a hell of a lot earlier than what we're doing now." (*Id.* at 26-27).

Plaintiff describes his speech at the meeting as of public concern because it lays the blame for the Waterfield Dam issues on the BOA or the Mayor. However, the transcript of Mr. Kincade's statements reflect that no such comments were made by plaintiff on October 14, 1991. An evaluation of the content, form and context of plaintiff's statements on October 14, 1991 suggest they were made in plaintiff's role as an employee and not in a role as a concerned citizen seeking to inform others of corruption,

malfeasance, misfeasance, nonfeasance or other problems with a City institution.

For these reasons, the Court recommends that defendants' Motion for Summary Judgment be granted as to plaintiff's third claim of protected speech, comments made at the Planning and Zoning Commission meeting of October 14, 1991.

III. QUALIFIED IMMUNITY

A. Applicable Legal Standards

The individual defendants also assert that they are entitled to summary judgment on the basis of qualified immunity. Public officials who violate the constitutional rights of another may nevertheless be entitled to immunity from damages if their conduct was objectively reasonable as measured by clearly established law. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). The term "clearly established constitutional rights" may not be used to read the defense of immunity out of federal law by stating constitutional rights in the most general possible terms. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In analyzing qualified immunity issues, the Court must first determine whether plaintiff has asserted a violation of a constitutional right. Next, the Court must determine whether the constitutional right in question was clearly established prior to the alleged violation. Although defendants bear the initial burden of coming forward with facts to suggest they were acting within the scope of their discretionary authority, plaintiff must demonstrate that the law allegedly violated was clearly established. If plaintiff can show defendants' conduct violated clearly established law, defendants must show that no material issues of fact remain as to whether their actions were objectively reasonable in light of the law and the information they possessed at the time of their actions. If there is no genuine issue as to any material fact pertaining to the objective reasonableness of defendants' actions, defendants are entitled to judgment as a matter of law. *See Cross v. City of Des Moines*, 965 F.2d 629, 631-33 (8th Cir. 1992).

It is well settled under *Connick* that the State may not punish a public employee for engaging in constitutionally protected expression. To be entitled to constitutional protection, the speech at issue must involve a matter of public concern. The requirement that the speech be of public concern is a necessary, but not sufficient, prerequisite for constitutional protection. In addition, the employee's interest in communicating on matters of public concern must be balanced against the State's interest as an employer in an efficient work place.

In balancing the interests of the employee and the employer, courts examine the following factors: (1) the need for harmony in the work place; (2) whether the

government's responsibilities required a close working relationship between the plaintiff and co-workers; (3) whether the speech has caused or could cause deterioration in the plaintiff's work relationships; (4) the time, place and manner of the speech; (5) the context in which the dispute arose; (6) the degree of public interest in the speech; and (7) whether the speech impaired the plaintiff's ability to perform his or her duties. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987).

In *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992), the Eighth Circuit recently recognized that at least five other circuits have concluded that because *Pickering's* constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered "clearly established" for purposes of the *Harlow* qualified immunity standard:

> It would appear that, whenever a balancing of interests is required, the facts of the existing caselaw must closely correspond to the contested action before the defendant official is subject to liability under . . . *Harlow*. With *Harlow's* elimination of the inquiry into the actual motivations of the official, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.

Bartlett, 972 F.2d at 916.

In *Bartlett v. Fisher*, plaintiff Bartlett, a highway patrol trooper, claimed that his suspension for twenty-five days violated his First Amendment rights. The suspension was allegedly imposed for Bartlett's submission of false activity reports overstating the number of warnings he had

issued to motorists. However, Bartlett alleged that his discipline was in fact imposed for a letter he sent to then Governor Ashcroft complaining that a new minimum work standard was in fact a ticket-writing quota system.

In reversing the district court's denial of the defendants' qualified immunity defense in *Bartlett*, the Eighth Circuit found that even if Bartlett's letter to the governor was a motivating factor in his suspension, the defendants were entitled to qualified immunity because they placed the *Pickering* balancing test squarely at issue by presenting evidence that Bartlett's letter to the governor had an adverse impact on the Patrol. The letter adversely affected morale because Bartlett's immediate supervisors were angry that he had taken his criticisms outside the normal chain of command. Further, the letter's wide dissemination to the general public was found to have further discredited the Patrol. Finally, the Eighth Circuit concluded that Bartlett unquestionably had a personal interest in complaining about the policy because he had failed to meet his minimum standards in the early months of the policy and was facing discipline or even discharge. The Eighth Circuit relied on the conclusion in *Connick* that:

> When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has

> threatened the authority of the employer to run the office.

Bartlett, 972 F.2d at 917 (quoting *Connick*, 461 U.S. at 153).

The issue is whether defendants acted reasonably under settled law in the circumstances, not whether another reasonable or more reasonable interpretation of the events could be constructed. *See Cross*, 965 F.2d at 632. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1048 (1993).

Defendants' reliance on the defense of qualified immunity must be evaluated in light of these standards.

B. Qualified Immunity In The Context Of Speech Not Subject To The First Amendment's Protection

Plaintiff's first claim of protected speech, that his actions in reorganizing his department to allow for the orderly handling of projects and to ensure that subdivision ordinances were consistently followed, has already been found deficient by the Court because plaintiff failed to delineate the speech at issue or to demonstrate how enforcement of subdivision ordinances constituted speech addressing an issue of public concern. (*See* Part II, *supra*) Further, the Court concluded that departmental reorganization is an internal agency matter and not of public concern. *Id.*

Even if a reviewing court determined that these conclusions were legally incorrect, the individual defendants

would still be entitled to summary judgment on plaintiff's first alleged instance of protected speech on the basis of qualified immunity. A reasonable official in 1991 would not have been aware that dismissal of an employee because of his internal departmental reorganization or general course of conduct, which did not convey a particularized message, was violative of the First Amendment. For many years prior to 1991, it had been clear that public employers could not dismiss employees in retaliation for instances of protected speech. However, for the reasons outlined by the Court in recommending dismissal of this claim, it would not have been apparent to defendants that plaintiff's first instance of alleged protected speech involved speech on matters of public concern. Thus, defendants' conduct was objectively reasonable and would entitle them to qualified immunity.

The Court has also concluded that plaintiff's third claim of protected speech, comments plaintiff made at the Planning and Zoning Commission meeting of October 14, 1991, was not speech on a matter of public concern and, thus, the Court has recommended that summary judgment be granted in favor of defendants on this issue. The content, context and form of plaintiff's statements at that meeting demonstrate plaintiff was speaking as an employee and not as a citizen attempting to inform the public of problems within the governmental organization.

For the reasons outlined by the Court in recommending the dismissal of this claim, the individual defendants would also be entitled to qualified immunity on this claim. Assuming that plaintiff was terminated for his speech at the October 14, 1991 meeting, termination of an employee for speech which an official could reasonably

believe was not a matter of public concern would entitle the official to qualified immunity. If the reviewing court would decide that defendants were not entitled to the complete dismissal of this claim, this Court would also recommend that the individual defendants' motions for summary judgment on the basis of qualified immunity by granted as to plaintiff's third instance of protected speech.

C. Application Of The *Pickering* Balancing Test In The Context Of Qualified Immunity

Defendants' qualified immunity arguments focus primarily on the second prerequisite for protected speech, the *Pinkering* balancing test, and advance the following rationale for finding qualified immunity as to all claims asserted against the individual defendants:

> All of the relevant considerations are implicated in the instant case. Mayor Grounds and the BOA testified that as a result of Kincade's repeated performance deficiencies, including his failure or inability to adequately or timely respond to questions in the August 5, 1991 closed executive session, and his last-minute reversals in the October 14, 1991 Planning Commission Meeting, they had lost confidence in him. *See supra* ¶¶ 13, 16, 20, 45. Certainly the City Engineer position is one in which personal loyalty and confidence are essential.
>
> As the numerous citizen and developer complaints lodged with the City officials and Kuntz's testimony illustrate, Kincade's communication of the City's enforcement of regulations

> substantially impaired the harmony among co-workers and damaged the operations of the City's Engineering and Community Development Departments through his ineffective communication and poor interpersonal skills, both within the city and outside of it. *See supra* ¶¶ 13-15, 17-18, 20, 33-36, 39.
>
> Numerous witnesses testified that Kincade caused serious interference with the efficient operation of the City. *See supra* ¶¶ 13-15, 17-18, 20, 33-36, 39. The stipulated transcript of the October 14, 1991 Planning Commission meeting undeniable [sic] establishes that Kincade's last minute reversals resulted in inefficiency to the City, its citizens, and the developers. As confirmed by several witnesses, Kincade's conduct in the course of the Planning Commission meeting caused the Mayor and the Commission's members palpable embarrassment and reflected poorly on Kuntz and on the City as a whole. *See supra* ¶¶ 34-39.

(Defendants' Memorandum In Support of Summary Judgment at 40-41)

Many of defendants' arguments are based on facts which are relevant to the issue of causation, not qualified immunity. The paragraphs referred to in defendants' arguments are references to defendants' Statement of Uncontroverted Material Facts. In turn, those "uncontroverted material facts" reference two volumes of exhibits. Many of the paragraphs of defendants' "uncontroverted material facts" and the accompanying exhibits reference efficiency problems with the City's operations

stemming from Kincade's overall performance inadequacies, not his speech of August 5, 1991 or October 14, 1991.

For example, paragraph 13 of defendants' Statement of Uncontroverted Material Facts refers to the BOA's receipt of numerous complaints concerning plaintiff's poor performance including complaints he was uncooperative, difficult to work with, refused to attend meetings and failed to keep scheduled appointments. Paragraph 16 refers to bad experiences that the individual defendants and other City officials had with plaintiff. While these complaints included plaintiff's last minute change in position at the October 14, 1991 meeting, they also included numerous other instances of poor performance such as plaintiff's failure to respond timely to customer service request forms and being unprepared to address an item on the traffic commission agenda. (*See* Defendants' Ex. 8 at 354) Another exhibit referenced in paragraph 16 of the uncontroverted facts, the deposition of defendant Morgan, contains defendant Morgan's statement that plaintiff's termination was based on a number of items that increasingly caused him frustration and displeasure. One instance specifically identified by defendant Morgan was his belief that plaintiff was unwilling to try and work out issues with developers through negotiations. (*See* Defendants' Ex. 26 at 200-03)

The facts advanced by defendants to support the *Pickering* balancing test appear to request that as part of the balancing test the Court consider defendants' interest in terminating an employee whose overall performance deficiencies were allegedly adversely interfering with the

City's efficient operations. For the most part, the complaints concerning plaintiff's performance deficiencies are not based on plaintiff's speech of August 5, 1991 and October 14, 1991, for which plaintiff seeks First Amendment protection.

Qualified immunity, however, is intended to protect public officials from individual liability for reasonable mistakes as to what actions are constitutional. In applying the *Pickering* balancing test, the balance is between the employee's interest in the speech and the employer's interest in regulating *the same speech*. Defendants' assertion of perfectly valid reasons for plaintiff's termination, such as personality and performance deficiencies, is highly relevant to whether plaintiff can demonstrate the protected speech was a motivating factor in his termination, one of the elements of plaintiff's case. However, causation questions involve primarily factual issues which the jury must resolve. *See Buzek v. County of Saunders*, 972 F.2d 992, 995 (8th Cir. 1992).

Defendants have failed to offer any evidence that plaintiff's speech on August 5, 1991, if as alleged by plaintiff, created disharmony, interfered with plaintiff's close working relationships with others or so impaired plaintiff's ability to perform his duties as to justify his termination. In short, there is a complete lack of evidence as to the effect of plaintiff's August 5, 1991 speech on the employer. There are no reasons advanced for the employer to have reasonably believed that plaintiff's speech adversely affected morale or for other reasons necessitated plaintiff's discharge. Due to this lack of evidence, the Court is not able to balance plaintiff's interest

in the speech with the interest of his employer in regulating the speech. Thus, defendants are not entitled to qualified immunity as to plaintiff's claim arising from the August 5, 1991 speech. *See Powell v. Basham*, 921 F.2d 165, 168 (8th Cir. 1990) (defendants failed to show that plaintiff's criticisms adversely affected efficiency of department and, thus, they were not entitled to summary judgment on qualified immunity issue); *Darnell v. Ford*, 903 F.2d 556, 561 (8th Cir. 1990) (defendant failed to show any injury or disruption to the work place affecting proper discipline as a result of plaintiff's speech, thus defendants' reliance on *Pickering* is misplaced).

In addition, the Court has previously determined that the contents of plaintiff's speech on August 5, 1991 is in dispute and that the dispute over the content of the speech prevents the Court from deciding, at the present time, whether the speech involved a matter of public concern. Many of the factors outlined in the *Pickering* balancing test cannot be weighed until the jury has resolved the issue of what was said. For example, the degree of public interest in the speech, whether the speech has impaired plaintiff's ability to perform his duties and whether the speech has caused a deterioration in plaintiff's working relationships will hinge, at least in part, on the content of the speech. Plaintiff has not requested that the Court perform this balancing test as part of his summary judgment motion. Defendants, although requesting judgment on the basis that plaintiff's interest in the speech does not outweigh the city's interest in regulating the speech, do not suggest any way of conducting this analysis in light of the factual dispute concerning the speech.

For the above reasons, the Court recommends that defendants' claim of qualified immunity with respect to plaintiff's second claimed instance of protected speech be denied at the present time.

D. Qualified Immunity Based On Reliance Of Advice Of Counsel

Finally, the individual defendants argue that they are entitled to qualified immunity in that they sought, received and relied on the advice of counsel in casting their votes in favor of terminating plaintiff's employment. The following facts are not in dispute:

> After the Mayor had stated that he had lost confidence in Kincade and the basis for his loss of confidence in Kincade, and after the aldermen had expressed their similar dissatisfaction regarding Kincade's job performance, the City Attorney, Mr. McDonald, explained that under the City ordinances and Missouri law, Kincade was an employee at will who served a [at] the pleasure of the BOA, and that consequently, Kincade's employment could be terminated at any time for any reason, as long as such reason was not unlawful. Mr. McDonald advised that the BOA was not required to have any reason to terminate Kincade's employment, but that the reasons the BOA and the Mayor had discussed were lawful reasons and that Kincade's employment could lawfully be terminated.
>
> Based on the legal advice they had received, the Mayor and the aldermen understood that seeking Kincade's resignation, or alternatively terminating his employment was not a violation of any law – including the Constitution.

(Defendants' Uncontroverted Material Fact Nos. 45 and 46; Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 43-44) There does appear to be some uncertainty about the substance of advice given by the City Attorney, Robert McDonald, at the October 21, 1991 meeting and whether he gave the advice before of [sic] after the vote had been taken.[10]

The advice that defendants claim they relied upon was Mr. McDonald's statement that plaintiff was an employee at will who could be terminated for any reason as long as the reasons for his termination were not unlawful. Further, McDonald indicated that the reasons given by the aldermen concerning plaintiff's performance were lawful reasons for his termination.

As the case relied on by defendants, *Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir. 1984), recognizes, reliance on advice of counsel alone will not satisfy an official's burden of acting reasonably. In *Tubbesing*, members of the Board of Election Commissioners of St. Louis County were sued by the former director of elections for the county alleging that she was deprived of a constitutionally protected property interest in her employment with the Board when she was terminated without due

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[10] Defendant Spears testified during his deposition that the only legal advice given by McDonald concerning the termination of plaintiff at the October 21, 1991 meeting occurred after the vote was taken and consisted of telling the members they should not discuss the reasons for plaintiff's termination outside the executive session. (*See* Depo. of Emil Spears at 12-13) However, defendant Spears' response is different in his answers to plaintiff's second interrogatories.

process. *Id.* at 402. Plaintiff Tubbesing's claim of a property interest was based on a policy manual of the St. Louis County Board of Election Commissioners which permitted termination only for cause with a right to a pretermination hearing. The Board sought the advice of counsel who told them the Director served at the pleasure of the Board. It was unclear whether the policy manual applied to directors. Thus, the court found that the Board members acted in good faith in following their attorney's advice. *Id.* at 407. *See also Wentz v. Klecker,* 721 F.2d 244, 247 (8th Cir. 1983).

Other factors that can be considered in determining whether advice of counsel entitles a public official to qualified immunity include how unequivocal and specifically tailored to the particular facts giving rise to the controversy the advice was and whether complete information had been provided to the advising attorney. *See V-1 Oil Co. v. Wyoming,* 902 F.2d 1482, 1489 (10th Cir. 1990), *cert. denied,* 498 U.S. 920.

Defendants argue that:

> [e]ven if terminating Kincade's employment based on his alleged "speech" had constituted a violation of "clearly established" law, these defendants have established that they sought, received, and relied on the advice of counsel in casting their votes in favor of terminating plaintiff's employment.

(Defendants' Memorandum In Support of Motion for Summary Judgment at 41) The problem with this argument is that if the Court is to assume that defendants terminated plaintiff based on his speech, counsel was not told of that fact at the time his advice was sought. The

Court cannot find defendants reasonable in relying on advice of counsel if all facts were not presented to counsel. The Court questions whether "advice of counsel" can provide a qualified immunity defense when the very conduct at issue and which defendants assert should be assumed, *i.e.* that plaintiff was terminated due to his speech, was never presented to the counsel who provided defendants with the advice they claim to have reasonably followed.

One of the issues in this case is whether plaintiff's speech on August 5, 1991 was a motivating or substantial factor in plaintiff's termination.[11] Yet, counsel did not advise defendants that if they were terminating plaintiff for his speech of August 5, 1991, it was constitutional nor was that the advice which was sought. Moreover, following the advice of counsel does not automatically cloak one with qualified immunity. Rather, advice of counsel may be considered in evaluating the reasonableness of the action taken. *See E-Z Mart Stores, Inc. v. Kirksey,* 885 F.2d 476, 478 (8th Cir. 1989).

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[11] In footnote 6 at page 22 of their Memorandum in Support of Motion for Summary Judgment, defendants argue that even if plaintiff could establish that he engaged in protected speech, he has an insufficient quantum of evidence to establish that the protected speech played a substantial role in the termination decision. Defendants' footnote suggests that plaintiff cannot survive summary judgment on this basis. Except for this footnoted reference to the second element of plaintiff [sic] cause of action, neither party briefed this issue nor did defendants seek summary judgment on this basis. In the Court's view that issue is not presently before it.

Thus, the Court concludes that in the circumstances of this case, the advice of counsel defense does not entitle the individual defendants to summary judgment on the basis of qualified immunity.

IV. FREDERICK SIEMS

Plaintiff has included the City Administrator, Frederick Siems, as a defendant in his lawsuit, alleging that Mr. Siems violated plaintiff's constitutional right to free speech.

The following facts are not in dispute:

1. Defendant Fred Siems was not a member of the BOA;[12]

2. Defendant Fred Siems was not capable of voting on the termination of plaintiff's employment;[13]

3. Defendant Fred Siems was not asked for his opinion or position on the termination of plaintiff's employment, nor did Siems offer any opinion or position on the plaintiff's termination;[14] and

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[12] (Defendants' Uncontroverted Material Fact No. 47; Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 44)

[13] (Defendants' Uncontroverted Material Fact No. 48; Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 44)

[14] (Defendants' Uncontroverted Material Fact No. 49; Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 44-45)

4. Defendant Fred Siems did not vote in favor of terminating plaintiff's employment.[15]

5. Siems was present throughout this executive session (October 21, 1991), but he did not speak.[16]

Plaintiff sets forth the following additional facts:

1. On August 28, 1991 a meeting was called by Grounds at the request of some BOA members to discuss Kincade's performance. Ericson, Flynn, Grounds and Siems supported Kincade.[17]

2. That at no time after August 28, 1991 did Siems come to Kincade and tell him that the BOA had a meeting to discuss his performance, nor did he tell Kincade that BOA members had expressed to him that Kincade should improve his communication skills with them, the citizenry of Blue Springs, or those who did business with the City, nor did Kincade hear from Siems orally or in writing that the BOA perceived Kincade had some performance problems that needed resolution.[18]

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[15] (Defendants' Uncontroverted Material Fact No. 50; Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 45)

[16] (Defendants' Uncontroverted Material Fact No. 44; Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 43)

[17] (Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 56, ¶¶ 70-71)

[18] (Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 56-57, ¶ 73)

> 3. After the October 14 meeting and before Kincade was terminated, Siems came to Kincade's office and closed the office doors and told him that the Mayor had told him that a large group of developers were coming to the BOA meeting (coming up) to demand Kincade's termination. Kincade asked Siems if they had the votes and he said he did not know. Kincade then asked Siems how he would respond to a question about his performance and he said that Kincade was doing his job and if someone on the Board didn't think so they should tell Kincade.[19]

Defendant Siems did not speak up on behalf of plaintiff during the October 21, 1991 meeting that resulted in plaintiff's termination, as he had on August 28, 1991. From this, plaintiff gleans an improper motive of Siems in not stopping plaintiff's termination because of: (1) plaintiff's speech complaining about Siems at the August 5, 1991 meeting;[20] (2) the fact that if the developers did not like Kincade, they might seek Siems' termination; and (3) the fact that continuing complaints about Kincade would

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[19] (Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 61, ¶ 88)

[20] This argument does not carry much weight in that plaintiff contends Mr. Siems supported him at the August 28, 1991 meeting. If Siems was out to seek revenge for plaintiff's August 5, 1991 speech, he would not have supported plaintiff on August 28, 1991.

reflect on Siems' ability as a supervisor.[21] (Plaintiff's Suggestions in Opposition to Defendants' Motion for Summary Judgment at 85-86)

Plaintiff cites no authority in support of his argument that Siems should have prevented others from violating plaintiff's First Amendment rights. The cases the Court has reviewed would suggest that no such affirmative duty exists. In *Kline v. North Texas State University*, 782 F.2d 1229, 1230 (5th Cir. 1986), plaintiff Kline, a pediatrics professor, persuaded a jury that various university officials, by their harassment of him, forced him to quit his job and that this harassment was in retaliation for the exercise of his First Amendment right to speak out. The Fifth Circuit reversed the jury's verdict. The court found:

> Kline urges that the real gist of his lawsuit is not so much that the defendant-appellants deliberately created intolerable working conditions, but that by failing to act, the defendant-appellants allowed intolerable conditions created by a third party, Gilifillan, to exist. In order to hold the defendant-appellants liable for failing to act, Kline must show that they had some legal duty to act to prevent or prohibit Gilifillan's harassment of Kline. We find no such duty on which liability can be based. First, Kline has not alleged, nor can we find, any individual duty they owed Kline that would trigger an affirmative duty to act.

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[21] Plaintiff has failed to tie his second and third reasons for Siems' alleged improper motive to any specific speech by plaintiff.

Id. at 1235. Those individuals who were not in a supervisory position over the third party who was harassing plaintiff Kline had no duty to act and, therefore, they could not be liable for failing to do so. *Id.* at 1236.

In *Musso v. Hourigan*, 836 F.2d 736, 739 (2nd Cir. 1988), plaintiff Musso, a citizen attending a school board meeting, was ordered to be quiet by school board member Millar while Musso was voicing an opinion and was eventually placed under arrest by the police. Musso brought suit against the officers who had arrested him, Millar and Mazzafero, another school board member. *Id.* The claim against Mazzafero was based, in part, on Mazzafero's failure to prevent Millar from violating Musso's First Amendment rights. *Id.* at 743. The court found that Mazzafero's alleged failure to act was protected under the doctrine of qualified immunity. *Id.* at 744. The court stated:

> We do not believe . . . that Mazzafero's alleged failure to prevent Millar from violating Musso's first amendment rights transgressed any clearly established legal norm. As a general rule, a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act. . . . Our research, however, has not uncovered any applicable case law suggesting that Mazzafero labored under a "clearly established" affirmative duty to prevent other school board

> members from infringing on Musso's first amendment interests.

Id. at 743-44.

Defendant Siems took no action himself that contributed to plaintiff's termination. Plaintiff has not shown that defendant Siems had any affirmative duty to act to prevent or prohibit the Board of Aldermen's termination of plaintiff, even if that termination was based on plaintiff's exercise of his First Amendment rights. In fact, plaintiff concedes that Siems had no legal duty to speak up for plaintiff. (Tr. of 10/6/93 Oral Argument at 71) Siems was not in a supervisory position over the Board, so he cannot be charged with a failure to adequately supervise the Board's actions. If he had no duty to act, he cannot be held liable for failing to do so. Siems is not liable to plaintiff, with or without the protection of qualified immunity. Therefore, the Court recommends that defendant Siems be granted summary judgment and dismissed from this suit.

V. CONCLUSION

Three instances of protected speech are at issue in plaintiff's action filed pursuant to 42 U.S.C. § 1983. For the reasons discussed in the Report, the Court makes the following recommendations to the District Court:

(1) The motion for summary judgment filed by the City of Blue Springs and defendants Grounds, Clark, Ericson, Morgan and Spears should be granted as to plaintiff's first and third claims of protected speech. These claims should be dismissed against the City and against defendants Grounds, Clark, Ericson, Morgan and

Spears in both their individual capacities and as aldermen.

Should the District Court decide not to follow this recommendation, in the alternative, it is recommended that defendants Grounds, Clark, Ericson, Morgan and Spears be granted summary judgment, individually, as to plaintiff's first and third instances of allegedly protected speech on the basis of qualified immunity. It is further recommended that

(2) Defendants' motion for summary judgment should be denied as to plaintiff's second claimed instance of protected speech. It is further recommended that

(3) Defendant Siems' motion for summary judgment should be granted, thereby dismissing all claims against defendant Siems, both individually and in his capacity as City Administrator.

In the alternative, if this recommendation is not followed, it is recommended that the Court grant defendant Siems' motion for summary judgment as to plaintiff's claims against him in his individual capacity on the basis of qualified immunity. It is further recommended that

(4) Plaintiff's motion for summary judgment should be denied.

Counsel are reminded they have ten days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections to same. A failure to file and serve timely objections shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the

District Judge, except on the grounds of plain error or manifest injustice.

/s/ Sarah W. Hays
SARAH W. HAYS
United States
Magistrate Judge

Date: January 10, 1994
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RONALD KINCADE, Plaintiff,	)	
v.	)	Case No. 92-0066-CV-W-2
CITY OF BLUE SPRINGS, MISSOURI, et al., Defendants.	)	

SUPPLEMENTAL REPORT AND RECOMMENDATION

(Filed Apr. 6, 1994)

Plaintiff Ronald Kincade, the former City Engineer/ Director of Public Works for the City of Blue Springs, Missouri, filed suit against the City of Blue Springs and the following employees of the City, Russell Clark, Evelyn Ericson, Larry Morgan, Emil Spears, Gregory Grounds and Frederick Siems, alleging that defendants violated his constitutional right to free speech by terminating his employment with the City. Three instances of alleged protected speech were at issue in plaintiff's action.

Plaintiff and defendants each filed motions for summary judgment. On January 10, 1994, the undersigned Magistrate Judge filed a Report and Recommendation in which it was recommended that summary judgment be granted in favor of defendants on plaintiff's first and third claims of protected speech. It was recommended that neither plaintiff nor defendants were entitled to summary judgment on plaintiff's second claim of protected

speech (the speech occurring August 5, 1991) because there was a factual dispute concerning what plaintiff said on August 5, 1991. It was noted in the Report and Recommendation that defendants argued in a footnote to the memorandum in support of their motion for summary judgment that even if plaintiff engaged in protected speech on August 5, 1991, there was an insufficient quantum of evidence to establish that the protected speech played a substantial role in the termination decision. However, the Court did not address this issue because neither party briefed the issue nor did defendants seek summary judgment on that basis. (1/10/94 Report & Recommendation at 39 n.11)

In defendants' objections to the Report and Recommendation, defendants argue that plaintiff has provided nothing other than his own self-serving affidavit to suggest that he made the statements he claims to have made on August 5, 1991. In addition, defendants argue that they are seeking summary judgment on the basis that even if plaintiff made the August 5, 1991 speech, there is insufficient evidence to show that the speech played a substantial role in the termination decision. These "objections" were actually new legal arguments not addressed by the parties' original summary judgment briefs or the Court's original Report and Recommendation. Thus, the parties were advised that plaintiff would be given an opportunity to respond to these new arguments and a Supplemental Report and Recommendation would be issued on these limited issues.[1] Having reviewed the

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[1] Plaintiff objects to the Court even considering these additional arguments in that they were not timely raised by

arguments of both defendants and plaintiff, the Court recommends that the District Court deny defendants' motion for summary judgment on plaintiff's second claim of protected speech (the speech occurring August 5, 1991).

I. Has Plaintiff Provided Sufficient Evidence To Establish That He Made The Statements He Claims To Have Made On August 5, 1991?

Plaintiff provided an affidavit in support of his motion for partial summary judgment which set forth the following:

> That on August 5, 1991 at a meeting of the BOA, I presented the problems with the dam, including, but not limited to:
>
> a. that the north end of the dam did not have required embankment materials;
>
> b. that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present thereby incurring the likelihood of erosion and reduced structural integrity of the dam;
>
> c. that additionally, the emergency spillway was not constructed of concrete as

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defendants. (Plaintiff's Reply to Defendants' Causation Argument at 2 n.1) By issuing this Supplemental Report and Recommendation, the undersigned is not deciding whether defendants are or are not entitled to raise the additional arguments. That decision rests with the District Court. The undersigned merely wanted to present the District Court with a recommendation on all potential summary judgment issues.

required by the design plans thereby contributing to the potential of erosion of the dam;

d. that the design for the dam had called for a 50 foot width at the top; the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway; the dam was actually only 42 to 49 feet wide as of August 14, 1991;

e. that the City had paid $62,510 to House and Weatherstone in June of 1987 even though the work had not been completed;

f. that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and

g. that because of the inadequacies of the dam, that homes and residents in those homes downstream of the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the aforesaid inadequacies.

(Plaintiff's Suggestions in Support of His Motion for Partial Summary Judgment at Ex. B, ¶ 18)[2]

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[2] These same facts are included in paragraph 67(a) through (g) of plaintiff's opposition to defendants' motion for summary judgment.

Defendants contend that this affidavit is merely a regurgitation of the claims in plaintiff's complaint and is, thereby, insufficient pursuant to *Jackson v. Missouri State Training School and Hospital*, 714 F.2d 802, 804 (8th Cir. 1983), and *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

The rule regarding the evidence necessary to show there is a genuine issue of material fact to defeat summary judgment has been set forth in Rule 56(e), Federal Rules of Civil Procedure, and by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The Court stated: "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. Defendants appear to read the rule as stating a party opposing a motion for summary judgment may not rest upon the allegations that are found in his pleading. However, this is not what the plain language of the rule states (nor the manner in which courts have interpreted the rule). The gist of the rule is that a party opposing a motion for summary judgment may not rest upon mere or conclusory allegations that are found in a complaint or other pleading. *See Chromalloy Am. Corp. v. Sun Chem. Corp.*, 483 F. Supp. 116, 117 (E.D. Mo. 1980) (party may not rest on unsubstantiated allegations in complaint in response to motion for summary judgment). Instead, a party opposing a motion for summary judgment must set forth specific facts in opposition to the motion that can be sworn to by someone who has knowledge about those facts. *See Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (verified complaint which

was based on personal knowledge and set forth specific facts may be considered in opposition to summary judgment); *Casella v. Webb*, 883 F.2d 805, 807 n.4 (9th Cir. 1989) (allegations in complaint and sworn declaration which charged misrepresentations alleged in complaint and reiterated reliance were sufficiently specific to satisfy requirement of Rule 56(e)); *McNeal v. Macht*, 763 F. Supp. 1458, 1461-62 (E.D. Wis. 1991) (nonconclusory evidentiary facts which are based upon plaintiff's personal knowledge and set forth in verified complaint transform statement of claim from mere allegations of pleading into specific facts as in evidentiary affidavit).

The cases cited by defendants do not contradict this rule. In *Jackson v. Missouri State Training School and Hospital*, 714 F.2d 802, 804 (8th Cir. 1983), the court found plaintiff's affidavit in opposition to defendant's motion for summary judgment lacking in that it merely reiterated plaintiff's claims without providing specific facts. In *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the issue before the court dealt with the sufficiency of evidence in opposition to a motion for summary judgment, rather than whether an affidavit was merely a reiteration of the claims in the complaint or whether it contained specific facts. The court found that plaintiff Cervantes presented only self-serving affidavits and some other evidentiary materials which framed a "minimal assault" on the truth of some matters contained in an article written about him. *Id.* at 994. Aside from this evidence, Cervantes did not produce "a scintilla of proof supportive of a finding that either defendant in fact entertained serious doubts about the truth of a single sentence in the article," the real issue in

the defamation case. *Id.* Cervantes, therefore, failed to provide sufficient evidence to counter defendants' affidavits that they published the article about plaintiff with no knowledge of the article's falsity nor with reckless disregard for its truth. *Id.* at 995.

Plaintiff Kincade has provided a sworn affidavit based on his personal knowledge which sets forth what he claims he told the Board of Aldermen on August 5, 1991 regarding specific problems with Waterfield Dam. Defendants have provided evidence to dispute what plaintiff claims was actually said. The fact that plaintiff provided the same specific facts based upon his personal knowledge in the complaint as he did in his sworn affidavit does not require the Court to find that he is resting upon the mere allegations of his pleading. Plaintiff has sufficiently shown the Court that there is a genuine issue for trial regarding what he said at the August 5, 1991 Board meeting.

II. Has Plaintiff Provided Sufficient Evidence To Establish That The Statements He Allegedly Made On August 5, 1991 Were A Substantial Cause Of His Termination?

Defendants contend that plaintiff admitted in his deposition that the cause of his termination was complaints about his job performance, rather than any speech he made on August 5, 1991. In addition, defendants argue that plaintiff has failed to produce any evidence of a connection between his alleged August 5, 1991 statements and his termination.

Plaintiff counters that there are sufficient facts based upon the sequence of events and statements made from which a jury may infer that defendants deprived plaintiff of his right to freedom of speech by terminating him for his complaints about Waterfield Dam which began on August 5, 1991 and continued through his termination on October 21, 1991. Plaintiff also maintains that defendants' contention that he admitted in his deposition that the cause of his termination was complaints about his job performance was taken out of context.

A. Plaintiff's Purported Admissions

Although, as defendants allege, plaintiff did state in his deposition that the Board terminated his employment because of complaints they received from developers, plaintiff consistently stated throughout his deposition (in pages not cited by defendants) that he was terminated because of his speech regarding Waterfield Dam on August 5, 1991 in that this speech (and plaintiff's attempts to subsequently follow up on the Waterfield Dam situation) prompted complaints from developers. For example:

Q: What is the reason that you were terminated?

A: . . . And in the matter of Waterfield Dam I discovered many deficiencies with the existing structure and problems that would possibly occur.

I presented that information to the board of aldermen, the developers put pressure on the board, in particular Mr. House, to terminate me so that these problems would go

away and so they obliged the developers and terminated me.

(Kincade Depo. at Vol. I, pp. 6-7)

Q: What was the [board's] improper motive [in connection with your termination]?

A: They did not want any problems surfacing in reference to the Waterfield Dam, they had been put under pressure to quiet the situation, to resolve it quietly, they had a feeling they needed to do that to protect themselves politically, they were threatened and they chose that method to relieve the problem.

Q: Who threatened them?

A: Developers, in particular Mr. House.

(Kincade Depo. at Vol. I, p. 55)

A: [An] agreement was prepared and dated March 21st of 1991, specifically required [Mr. House] to do certain things. To this date those things have not been done and yet no action has been taken on that.

I had stated to the board of aldermen that there was a payment made to Mr. House of $62,510 for additional width to be provided on the crest of the dam, he had billed the city, it had been authorized and paid and no such material existed on site; in fact, the dam wasn't even as wide as the original design required that it be.

Then again on August 15th I believe I met with Mr. House at the direction of the board of aldermen to see if we could work these problems out.

I handed him a list of the items of deficiency that I had noted, he got very upset, told me I had no business causing him any problems with the dam and . . . that he would turn it over to his attorney.

* * *

I went over to city hall and asked to see the city administrator and the city clerk told me that he was in closed-door meeting with the mayor and Mr. House.

* * *

At [the October 14, 1991] meeting Kathy Stark commented that she had been told recently that the city had accepted the dam. After that meeting I saw Mr. Grounds talking to Kathy Stark, I later approached [Mr. Grounds] in the presence of Mr. McDonald . . . and asked him if the board of aldermen had made any decision since the comments at the planning commission indicated somebody was saying they had.

He said that some of the members of the board of aldermen wanted to pursue it, the newer members were willing to go to prosecution, the members that had been on for a while were preferring not to do anything because it appeared that they would be negligent.

* * *

It wasn't long after that that we came to the board of aldermen meeting and they were supposedly going to meet at that meeting, according to Mr. McDonald, and discuss the Waterfield Dam and resolving that problem.

The result of that meeting was they agreed to accept the dam according to both Mr. McDonald and Mr. Siems, who I asked the following days, as well as deciding to terminate me as an employee of the City of Blue Springs.

(Kincade Depo. at Vol. I, pp. 63-67)

Q: That's why I'm asking you why the board didn't fire you in March of '91 if you claim that they succumbed to House's pressure, you took a position adverse to House at that time?

A: That's correct, but the position I took was that certifications and additional information had to be provided and approved by the city.

It wasn't until that information indicated and showed to me that those things that I just stated were not present, a major concrete structure on the dam, the certification of the dam itself, the storm water management and the widening of the dam where he had already received $62,510 of city monies for doing something he did not do.

And I knew once all of that came to light that Mr. House would take whatever actions he felt was appropriate to solve that problem for himself.

Q: And that is the stuff that you knew sometime in August?

A: By the 1st of August I knew those things existed.

(Kincade Depo. at Vol. 1, p. 197)

Q: In what respect do you then believe that your attempts to enforce the regulations led to your termination by the city?

A: . . . And it was this pressure [complaints] that [the board members] were under that led to the termination, in particular the pressures they came under after the Waterfield Dam because it was a major issue for both Mr. House as well as a couple of other developers that wanted to use it.

* * *

Q: You said a minute ago that the pressures that were brought to bear when Waterfield Dam became a major issue, what point in time do you place that?

A: After August, 1991.

Q: That's when you think Waterfield Dam became an issue, a big issue?

* * *

A: . . . I'm assuming you mean that when did the Waterfield Dam become a major concern to the board of aldermen and my answer would be that after I presented the information to them on August 5th, 1991, it was clear that there was deficiencies that had to be corrected and there were major problems and in those deficiencies would affect both the dam itself, the Waterfield storm water management plan and the possible future of the Adams Dairy Parkway extending over the top of the dam.

Q: Is your answer after August 5th, 1991?

A: Yes.

* * *

Q: . . . Do you believe that you were fired because you wanted the developers to comply with ordinances and that the city defendants did not want you to do that?

A: I believe that they fired me because I was doing that and that the result was the developers were complaining and that they were tired of hearing the complaints and in particular the Waterfield Dam was the – was a problem that they had to resolve and the developer wasn't willing to resolve it so it was going to be – continue to be a major problem for them to deal with and the easiest solution for them was to accept it, not fight the developer, and terminate me.

Q: What complaints about Waterfield Dam are you alleging that the board of aldermen received?

* * *

A: Well, obviously they had heard from Ron Flori and Roger Bennett as well as Bill House concerning the fact that Waterfield Dam, Mr. House was saying, was ready for city acceptance, it was done, everything was done according to the design, and therefore, it was affecting the two other developers, they in turn were having problems with their plats.

Those are the kinds of complaints that I know the board of aldermen were hearing.

Q: About Waterfield Dam?

A: About Waterfield Dam.

(Kincade Depo. at Vol. IV, pp. 764-766, 768-772)

> Q: . . . Now, what do you believe was Mr. Siems' position with respect to your termination?
>
> A: I believe that at that point he desired not to be in anyway a party to the concerns that the board had about complaints, and in particular the Waterfield Dam, and that if the board was wanting to terminate me as part of the solution to the Waterfield Dam that he would not interject any comments and objections to that.

(Kincade Depo. at Vol. IV, p. 820)

This evidence, viewed most favorably to plaintiff, does not demonstrate that plaintiff admitted the cause of his termination was complaints about his job performance unrelated to his speech.

B. Connection Between Plaintiff's August 5, 1991 Statements And His Termination

The rule regarding the evidence necessary to establish that an employee's speech was the cause of the employee's termination has been set forth in *Cox v. Miller County R-I School District*, 951 F.2d 927 (8th Cir. 1991). The court stated:

> In order to establish a 42 U.S.C. § 1983 cause of action alleging violation of his first amendment rights, the plaintiff must show that he engaged in constitutionally protected speech and that the protected speech was a substantial or motivating factor in the decision to terminate him.

Id. at 931. *See also Bausworth v. Hazelwood Sch. Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993).

1. Constitutionally Protected Speech

The first prong of this test has been addressed by this Court in its prior Report and Recommendation of January 10, 1994. As set forth in that Report and Recommendation, the determination of whether plaintiff Kincade's speech is protected depends upon an evaluation of: (1) whether plaintiff's speech addressed a matter of public concern; and (2) whether plaintiff's interest in commenting on matters of public concern is outweighed by the City's interest in rendering efficient services. (1/10/94 Report & Recommendation at 4) The Court found:

> If plaintiff Kincade can prove he made the statements [he claims to have made on August 5, 1991], the speech would address matters of pubic [sic] concern, *i.e.* the construction of a dam, the use of City money to pay for improvements to the dam that may not have been made and dangers of downstream damage from the inadequacies in the dam. Thus, the Court cannot accept defendants' argument that plaintiff's August 5, 1991 speech could not be a matter of public concern under any circumstances.

(1/10/94 Report & Recommendation at 17) The jury must decide the factual dispute concerning the nature and substance of plaintiff's speech along with the issue of whether plaintiff's speech created disharmony in the work place. (1/10/94 Report & Recommendation at 19) Thus, defendants are not entitled to summary judgment on their argument that plaintiff has failed to show that he engaged in constitutionally protected speech.

2. Substantial Factor In Termination Decision

Assuming for purposes of summary judgment that plaintiff has shown that he engaged in constitutionally protected speech, the next inquiry is the second prong of the *Cox v. Miller County R-I School District* test, whether plaintiff has shown that his protected speech was a substantial or motivating factor in the City's decision to terminate him.

Defendants argue that plaintiff has failed to meet this burden because he has produced no evidence of a connection between his August 5, 1991 statements and his termination. In addition, defendants argue that plaintiff cannot meet this burden in that there was no discussion of plaintiff's August 5, 1991 statements during a Board of Aldermen meeting on August 28, 1991 at which plaintiff's job performance was discussed. Further, the last straw which led to plaintiff's termination was his "bungling" of the October 14, 1991 meeting.

Defendants analogize plaintiff's termination to that of the plaintiff in *Cox v. Miller County R-I School District*, 951 F.2d 927 (8th Cir. 1991). Plaintiff Cox, a school bus driver, was terminated on March 16, 1987 after the school received numerous complaints from parents about plaintiff's behavior, the most serious complaints coming on March 10 and 11, 1987. *Id.* at 930. Plaintiff Cox alleged that his employment was terminated in retaliation for his vocal opposition in April 1986 and January 1987 to tax levy increases proposed by the school board. *Id.* at 929. However, the court noted that subsequent to the meeting in April 1986, during which plaintiff Cox made statements in opposition to the proposed tax levy increase, he

was rehired on May 23, 1986 for the following school year with added responsibilities and an increase in salary. *Id.* at 932. In addition, no adverse employment decisions were taken against other school bus drivers who, like plaintiff Cox, voiced opposition to the tax levy increase. *Id.* The tax levy increase was passed by the voters in February 1987. *Id.* at 930. The court found:

> There simply is no evidence in the record that the termination decision was in any way affected by plaintiff's opposition to the tax increase, except for the simple fact that plaintiff voiced his opposition to such increase. That fact alone, however, is insufficient to carry plaintiff's burden of establishing that such constitutionally protected conduct was a substantial factor in the termination decision.

Id.

The case of *Cox v. Miller County R-I School District* has similarities to the case before this Court, but it also has some significant differences. Like the *Cox* case, plaintiff Kincade made an arguably serious mistake just prior to his termination, the "bungling" of the October 14, 1991 meeting. Like the school in *Cox*, the City of Blue Springs and various board members received numerous complaints about plaintiff Kincade's job performance. However, there was no evidence set forth in the *Cox* case to suggest that the parents' complaints about plaintiff Cox's performance were in any way related to Cox's vocal opposition to the tax levy increase. Plaintiff Kincade argues that his speech of August 5, 1991 and actions relating to the Waterfield Dam caused the developers to complain to the Board which, in turn, caused the Board to

terminate his employment. Specific instances of the alleged connection between plaintiff Kincade's speech and actions, the developers' complaints and plaintiff's termination are set forth at section II.A., *supra*. Unlike the *Cox* case, no affirmative actions were taken by the Board of Aldermen in favor of plaintiff Kincade after his protected speech, the Board simply failed to terminate him after a discussion of his performance on August 28, 1991. After Cox's speech, the school board had rehired him for the following school year with added responsibilities and an increase in salary. Unlike the *Cox* case, the issue of Waterfield Dam continued to be a live issue until plaintiff Kincade's termination. The tax levy increase in *Cox* was no longer an issue at the time of Cox's termination since the voters had already passed the increase.

Construing the facts and any inferences from those facts in a manner most favorable to plaintiff, the Court believes a factual issue exists as to whether there is a connection between plaintiff's August 5, 1991 statements and his termination. The following facts and inferences relating to such a connection have been presented to the Court:[3]

1. After advising the Board of Aldermen of his concerns regarding Waterfield Dam at the August 5, 1991 meeting, the Board instructed plaintiff to meet with developer

---

[3] The Court acknowledges that defendants dispute many of the following facts. However, for purposes of a motion for summary judgment, the Court must view the facts and inferences from those facts in the manner most favorable to the party opposing summary judgment.

House regarding plaintiff's concerns. (Kincade Depo. at Vol. I, p. 239)

2. Plaintiff had gone to the Board of Aldermen before he discussed these issues with developer House because he believed that House was "always running to the Board" and that there would be repercussions from House. (Kincade Depo. at Vol. II, p. 362)

3. On August 15, 1991, plaintiff met with developer House to go over the problems regarding Waterfield Dam which plaintiff had discussed with the Board. (Kincade Depo. at Vol. I, p. 64)

4. Waterfield Dam became a major issue to the Board of Aldermen because of pressure, in the form of complaints, from developers. (Kincade Depo. at Vol. IV, pp. 766, 768-770)

5. Prior to August 28, 1991, several members of the Board were unhappy with plaintiff and wanted to terminate his employment. (Ericson Depo. at pp. 74-75)

6. An emergency Board of Aldermen executive session was called by defendant Morgan on August 28, 1991 to discuss plaintiff and complaints that were being received from developers. After a discussion of plaintiff, Dixie Flynn asked whether plaintiff was at a point where termination should be considered. (Flynn Depo. at Vol. I, pp. 60, 63, 67)

7. Defendant Siems confirmed that plaintiff's termination was mentioned at the August 28, 1991 meeting. (Siems Depo. at Vol. I, p. 129)

8. Defendant Clark was confronted by developer House who stated he did not understand why plaintiff's complaints about the dam were being pursued. (Clark Depo. at p. 124)

9. According to plaintiff, defendants Clark, Ericson, Morgan and Spears were aware that if plaintiff continued to raise issues regarding Waterfield Dam, their part in these actions, as well as defendant Grounds' and the Board's part, would be raised to the voting public. (Plaintiff's Answers to Defendants Clark's, Ericson's, Morgan's and Spears' Interrogatories at No. 4(5))

10. Defendants Morgan and Spears indicated to defendant Grounds that they wanted to get rid of plaintiff a few months before his termination. (Grounds Depo. at Vol. I, p. 152)

11. Plaintiff informed defendant Siems in September 1991 that developer House was still in violation of the Development Agreement with the City. Siems told plaintiff that it was up to defendant Grounds and the Board whether any action would be taken to enforce the Agreement. (Kincade Affidavit at ¶ 22)

12. Defendant Grounds attended a meeting of the Blue Springs Businessmen's Association at which, among other things, complaints about the City's Engineering Department were discussed. Developer House was one of the persons expressing concerns at the meeting. (Grounds Depo. at Vol. I, p. 13)

13. On October 10, 1991, defendants Grounds and Siems met privately with developer House regarding Waterfield Dam. (Kincade Depo. at Vol. II, pp. 337, 363)

14. On October 14, 1991, prior to the Planning and Zoning Commission meeting, plaintiff met with defendants Grounds and Siems to discuss plaintiff's concerns about plats that were on the meeting's agenda which would impact Waterfield Dam. (Kincade Affidavit at ¶¶ 27-29)

15. At the October 14, 1991 meeting, Kathy Stark commented that she had been told recently that the City had accepted Waterfield Dam. Plaintiff asked defendant Grounds about Ms. Stark's comment and Grounds responded that the members of the Board that had been on for a while were preferring not to do anything about the Dam because it appeared that they would be negligent. (Kincade Depo. at Vol. I, p. 65-66)

16. Developer House contacted defendant Grounds to require him to "fix the problem" after developer Bennett (one of the developers affected by the October 14, 1991 meeting) called House. (House Depo. at p. 135)

17. The day after developer House contacted defendant Grounds, Grounds called House and told him that the staff and the Board understood the problem and that they would handle it. (House Depo. at p. 141)

18. On October 16, 1991, defendant Siems told plaintiff defendant Grounds had advised

Siems that developers would be present at the next Board meeting to request plaintiff's termination. Plaintiff believed the developers were to be led by developer House. (Plaintiff's Answers to Defendant House's Interrogatories at No. 5(9); Siems Depo. at Vol. I, p. 113)

19. Michael Beaty, the Assistant City Engineer, was under the impression that the developers were requesting plaintiff's termination because of the Development Agreement and Waterfield Dam. (Beaty Depo. at Vol. I, pp. 95-96)

20. On October 21, 1991, the Board of Aldermen agreed to "accept" Waterfield Dam and terminate plaintiff's employment. (Kincade Depo. at Vol. I, p. 67)

21. Developer House believes Waterfield Dam has been accepted by the Board. (House Depo. at pp. 125-126)

22. On October 29, 1991, Michael Beaty, acting City Engineer, met with several developers regarding acceptance of a drainage basin that Beaty had previously rejected. Developer Parker indicated to Beaty that Beaty could be let go the same way plaintiff was let go. Parker told Beaty that plaintiff had not been cooperative enough and if Beaty was not cooperative, he could be in the same situation. (Beaty Depo. at Vol. II, pp. 412-413)

23. Immediately following his meeting with developers, Michael Beaty asked defendant Grounds about Waterfield Dam. Grounds informed Beaty that the Board decided not

to proceed with a lawsuit against developer House even though they knew the dam was not adequate. Grounds further informed Beaty that the issue of the structural integrity of the dam was to be dropped. (Beaty Depo. at Vol. I, pp. 91-92 and Vol. II, p. 412)

24. Waterfield Dam and the Development Agreement with developer House have not been discussed by the Board since October 21, 1991. (Siems Depo. at Vol. I, pp. 156-159 and Vol. II, pp. 372-373, 375; Flynn Depo. at Vol. I, pp. 132-133; Ericson Depo. at pp. 104-106)

From the facts and inferences listed above, a jury could find that the issue of Waterfield Dam would have been a continuing thorn in the side of the Board as long as plaintiff was employed as City Engineer and the Board refused to act on the deficiencies plaintiff allegedly made known to them on August 5, 1991. Further, a jury could find that since plaintiff's termination, Waterfield Dam has ceased to be an issue to the Board despite the fact that the problems allegedly brought to the Board's attention by plaintiff on August 5, 1991 have not been resolved. The Court believes that plaintiff has provided a sufficient connection between his speech of August 5, 1991 and his termination to present the issue to a jury for determination of whether the speech was a substantial factor in the City's decision to terminate him.

III. Conclusion

For the reasons discussed in this Report, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying defendants' motion for summary judgment on plaintiff's second claim of protected speech (the speech occurring August 5, 1991).

Counsel are reminded they have ten days in which to file any objections to this Report and Recommendation. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the District Court, except on the grounds of plain error or manifest injustice.

/s/ Sarah W. Hays
SARAH W. HAYS
United States
Magistrate Judge

Date: April 6, 1994
Kansas City, Missouri

(2)

Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

No. 95-1119

In The

Supreme Court of the United States

October Term, 1995

CITY OF BLUE SPRINGS, MISSOURI, *et al.*,

Petitioners,

vs.

RONALD KINCADE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTIONS PRESENTED FOR REVIEW

I. Does a public employee's verbal report to his supervisors on a topic of potential interest to the public, made in the course of responding to a specific work assignment, necessarily constitute speech made "as a citizen" and "upon matters of public concern" protected by the First Amendment under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983)?

II. Because the protected status of a public employee's verbal report to his supervisors, made as a job assignment, is not "clearly established," does this Court's decision in *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam), compel a grant of qualified immunity to government officials prior to trial?

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APPENDIX

Appendix A — Affidavit Of Ron Kincade 1a

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At the time Petitioners filed their appeal with the Eighth Circuit Court of Appeals on issues of whether Respondent had engaged in protected First Amendment expression, whether individual Petitioners were entitled to qualified immunity, and whether there was sufficient evidence to proceed to trial, Respondent sought leave to file a cross appeal on the grant of summary judgment to Petitioners on two of three of Respondent's claimed First Amendment expressions. That request was denied by the Eighth Circuit and therefore the only claimed First Amendment expression before this Court is the expression which occurred on August 5, 1991 at a closed meeting of the Board of Aldermen in Blue Springs, Missouri.

Respondent submits that this Court does not have jurisdiction to review the order in question by writ of certiorari because none of the possible questions presented by the Petitioners concern conflicting decisions of courts of appeal or state courts nor do they bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaty or laws of the United States, nor have the Petitioners described any title, right, privilege or immunity as is being especially set up or claimed under the Constitution, treaty or statutes of the United States.

STATEMENT OF THE CASE[1]

Petitioners claim in their Statement of Facts at pages 2-3 that

---

1. Appendix A consists of the Affidavit of Respondent Ronald Kincade referenced in the Eighth Circuit's Opinion of August 26, 1996 as Appellee's Supp. Addend. at B-6 at App. 5

the report of Respondent on August 5, 1991 was "made in the course of [respondent] performing a work assignment." This is an overbroad statement which is contrary to the record. (*See* App. 2a-7a ¶¶ 9, 12 through 19.) Additionally, although the decision of the District Court indicated that the Petitioners denied these statements were made at this meeting, the Record on Appeal demonstrated that several of the Petitioners recalled different aspects of Respondent's report. For example, Petitioner Morgan believed that when Respondent spoke at the August 5 meeting he was saying the dam might not be safe. Morgan also stated that Respondent stated that not all the dirt paid for by the City was in place at the dam and that consequently the dam was not as wide as was contracted for by the City with House. Morgan also stated that after Respondent was terminated, none of these issues regarding the dam were directed to the new City Engineer. A second Petitioner, Clark, recalls discussion by Respondent that "there wasn't the proper amount of dirt put on the [Waterfield] dam." Flynn, a BOA member but not a Petitioner, recalls some discussion about widening of the dam, certification, as built(s) [drawings of the dam], verification of the integrity of the dam and concern about "downstream safety". Ericson, a third Petitioner, recalls a meeting where Respondent discussed that House (the developer of Waterfield Dam and housing development) had not complied with the Development agreement.

The Statement of Facts is also silent as to events occurring —or not occurring — both before and after August 5, 1991 and prior to Respondent's termination which are key to an understanding of the issue. Prior to the August 5, 1991 meeting of Respondent with the BOA, Respondent had received a satisfactory rating and no indication that he was not performing as the BOA wished him to perform. The only issue that was raised to him by his supervisor Siems was that he needed to be more sensitive to the "P" or political factor. (*See* App. 3a, ¶ 10.)

Respondent contends at the August 5, 1991 meeting the BOA asked him to approach House with regard to the problems he had reported to them. Respondent did in fact do so on August 15, 1991. After that meeting, the BOA received pressure from developers over the Waterfield dam resulting in the calling by several of the BOA members on August 28, 1991 of a meeting to discuss possible termination of Respondent. (*See* App. 93-94.)

At the executive session on October 21, 1991 the BOA agreed to accept Waterfield Dam, over the objections stated by Respondent on August 5, 1991, and terminate Respondent. After this meeting, the issues raised by Respondent on August 5, 1991 and after that about Waterfield Dam were never raised again by anyone in the City as of the time of ruling on Summary Judgment.

When Respondent asked for a reason why he was being terminated, he was told by the City Attorney, no reason would be given as it might give rise to liability on the part of the City.

REASONS FOR NOT GRANTING THE WRIT

I.

THERE IS *NO* CONFLICT IN THE CIRCUITS ON THE IMPORTANT AND RECURRENT ISSUE OF WHETHER A PUBLIC EMPLOYEE'S SPEECH MADE IN RESPONSE TO A SPECIFIC WORK ASSIGNMENT CONSTITUTES PROTECTED SPEECH "AS A CITIZEN UPON MATTERS OF PUBLIC CONCERN" UNDER THE FIRST AMENDMENT.

A. General Principles

Although generally Petitioners correctly state the law as it applies to government employees' First Amendment rights in the workplace, Petitioners would skewer the language of *Pickering*

v. Board of Education, 391 U.S. 563 (1968)—the right of a public employee as a **citizen**, in commenting upon matters of public concern—to infer that a public employee in responding to a work assignment can **never** have the benefit of First Amendment protection when he speaks about such matters **because** he will always be acting as an **employee** whose work can be scrutinized by his superiors thereby giving rise to a lawsuit by the employee if he believes he was unduly criticized for such assignment or discharged because of his response to said assignment. Petitioners claim that the Circuits are "split" over whether such a situation gives rise, as Respondent claims here, to a 1983 action. Respondent states there is no such split.

Rather, the Circuit Courts of Appeal since *Connick v. Myers*, 461 U.S. 138 (1983) have, as directed by this Court in that case, adopted a "case by case" approach on the basis of "the content, form, and context of a given statement, as **revealed by the whole record,**" of the capacity in which the employee is speaking. 461 U.S. at 147-48. A review of the cases cited by Petitioners clearly show that the Courts of Appeal have attempted to ferret out — using slightly different approaches in doing so — whether what the particular employee is talking about, the content of the speech — is focused upon a matter of "public concern" or a matter of "personal interest". When the **content, form and context** show the matter to be a matter of "public concern", then the Courts of Appeal have found the government employee to be speaking as a "citizen". However, when the **content, form and context** show the matter to be a mere personal matter, one of internal [as to the employee's department] meaning only, then the employee has been found to be speaking as a mere "employee".

To adopt the skewered interpretation of the Petitioners is to adopt a "per se" rule that government employees can never speak to a matter of "public concern" when they are responding to a work assignment because a supervisor may always take issue

with the presenter and the presenter may then always attack the supervisor on First Amendment grounds. No such "per se" interpretation of *Pickering* or *Connick* should be adopted by this Court. Nor should this Court adopt the opposite "per se" rule—that just because a government employee is responding to a work assignment and all government employee work deals with matters that are of "general public concern" that therefore such employee's "speech" is always protected by the First Amendment forever precluding that individual from being disciplined or discharged for the manner in which he carries out his work.

B. This Case Does Not Present A Substantial Question Which Has Not Been Resolved By This Court's Prior Decisions.

Petitioners would have this Court believe that the Eighth Circuit has adopted the latter "per se" rule in this case, and/or that other Courts of Appeal are adopting such a "per se" rule, which requires this Court to address the issue:

> under what "circumstances, if any[2], is a government employee's speech, made while performing or in the furtherance of a work assignment, entitled to constitutional protection."[3]

---

2. This phrase — "if any" — clearly is the real agenda of the Petitioners in this case—to have this Court fashion a rule whereby there are no circumstances under which an employee who reports malfeasance, misfeasance or other wrongdoing attributable in whole or in part to those who gave him an assignment can ever claim the protection of the First Amendment. This "per se" rule has not been adopted by any Circuit although Petitioners would infer it has in fact been so adopted.

3. *See* Petitioners' Brief at 8, citing *Koch v. City of Hutchinson*, 847 F.2d

(Cont'd)

Rather, Petitioners seem to ignore this Court's clear direction in *Connick* that the way to distinguish whether an employee is speaking as a "citizen upon a matter of public concern" or as "an employee upon matters only of personal interest" is to look at the "content, form and context of a given statement, as revealed by the whole record." 461 U.S. at 147-148. When the cases post the 1983 decision in *Connick* are segregated from the pre *Connick* cases, one can see over the last 13 years a growing consensus among the Courts of Appeal of exactly what constitutes a "matter of public concern". The alleged "hodge podge" of approaches has resulted not as Petitioners' claim from a lack of clarity about the manner in which these cases should be reviewed, but from the directions of this Court, that each case must be taken on its own facts and analyzed on its own facts on a case by case approach. This is in fact required by the "standard of review" in First Amendment cases.

C. There Is *No* Conflict In The Circuits.

Petitioners make a blatantly false statement to buttress their ill-taken claim there is a "conflict in the circuits" in the application of the "form and context" language from *Connick.* Petitioners claim the Eighth Circuit ignored the "form and context" of Respondent's speech because Respondent only made his statements to the BOA in his capacity as an employee; and, that "he in no way attempted to expose alleged misconduct or to communicate anything whatsoever to the public."[4] To the contrary the Opinion of the Eighth Circuit (App. 4-5) as well as the Opinion of the Magistrate adopted by the District Court (App. 36-37) set forth the following statements that Kincade claimed to have made at the August 5, 1991 meeting:

(Cont'd)

1436, 1442 (10th Cir.) *(en banc), cert. denied,* 488 U.S. 909 (1988).

4. *See* Petitioners' Brief at pp. 9-10.

a. that the north end of the dam did not have required embankment materials;

b. that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present thereby incurring the likelihood of erosion and reduced structural integrity of the dam;

c. that additionally, the emergency spillway was not constructed of concrete as required by the design plans thereby contributing to the potential of erosion of the dam;

d. that the design for the dam had called for a 50 foot width at the top; the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway; the dam was actually only 42 to 49 feet wide as of August 14, 1991;

e. that the City had paid $62,510 to House and Weatherstone in June of 1987 even though the work had not been completed;

f. that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and,

g. that because of the inadequacies of the dam, that homes and residents in those homes

> downstream of the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the aforesaid inadequacies.

Petitioners claim the District Court and Eighth Circuit should not have **first** focused on the "content" of Respondent's alleged speech and its "hypothetical" interest to the public at large; but rather the District and Appellate Courts should have **first** determined whether it was made by an employee responding to a work assignment. The fallacy of this argument in construing *Connick* is crystal clear when the Respondent's actual **statement** is plumped down in front of this Court as it was before the District and Eighth Circuit. **In this case,** by **first** looking at the employee's statement both the District and Appellate courts could easily determine that Respondent's statement was made by the employee in his capacity as a "citizen" because the statement on its face is so clearly regarding matters of public importance (the malfeasance and/or misfeasance of BOA members and developers) and not related to the employee's own work performance, or the reporting employee's department's performance. Thus, by first reviewing the statement by the employee, the Court could then easily make the determination of whether Respondent was speaking as an "employee" or a "citizen".

This might not be so in all cases, however because as the Court in *Terrell v. University of Texas System Police,* 792 F.2d 1360 (5th Cir. 1986), *cert. denied,* 479 U.S. 1064 (1987) stated: "almost anything that occurs within a public agency could be of concern to the public . . . ." *Id.* at 1362. However, in those cases cited by the Petitioners as demonstrating there is a "conflict", there is a clear common thread—that the employee claiming the First Amendment protection was at the time of the alleged

protected "speech" speaking out on a matter that personally concerned himself as opposed to dealing with a matter which is at somewhat of a "distance" from the speech maker.

In this context, it is clear there is no "conflict in the circuits"[5] but rather a growing consistency in the Circuits that speech when centered on personal problems of the employee making the speech will not be considered protected speech, while speech made in the course of work speaking to malfeasance, misfeasance or other matters of public importance not touching upon the individual speech maker, will have the protection of the First Amendment. Although Petitioners claim there is a split in the Circuits because the Circuits analyze the cases on an "employee v. citizen" approach described as "content based" in *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S.Ct. 634 (1993); a "contextual" approach based on the employee's subjective "intent"[6] in making the

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5. *See* cases collected by Petitioners at Footnote 2 at page 11 of brief: *Morgan v. Ford*, 6 F.3d 750 (11th Cir. 1993) although involving complaints about sexual harassment, involved Morgan's personal sexual harassment complaint; *Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir. 1993) involved Gillum's personal employment issue; *Bausworth v. Hazelwood School District*, 986 F.2d 1197 (8th Cir. 1993) does not involve Bausworth as a result of a work assignment making a complaint about other government workers, but merely relates the concerns of others; *Thomson v. Schied*, 977 F.2d 1017 (6th Cir. 1992) deals with Thomson's internal office politics as opposed to something the public at large would consider important; *Marquez v. Turnock*, 967 F.2d 1175 (7th Cir. 1992) Marquez was complaining about policies affecting him and others in his department; *Coughlin v. Lee*, 946 F.2d 1152 (5th Cir. 1991) Coughlin complaining about internal office matters. The other cases are to like effect.

6. The *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985) line of cases cited by defendant at their brief commencing at page 13 and in Footnote 3 are therefore no different than the cases cited at Footnote as following *Terrell*. In both circumstances when the focus is on the employee's personal agenda or internal politics the claim will fail.

speech; or a hybrid of the two when the speech would not necessarily qualify on the basis of its content alone as protected speech, there is in reality but one approach—a case by case analysis to determine whether the content of the speech is meant to be directed to a higher public good, or whether it is merely meant to foster a personal agenda of the speech maker. Attaching different "labels" to the analysis of the fact situation, does not make for a "conflict in the Circuits" as Petitioners here propose.

D. The Results In The Circuits Are Consistent With The Above Analysis.[7]

Although the Petitioners have carefully crafted their questions and argument to demonstrate there is a split in the Circuits—where in fact there is none—nothing demonstrates Petitioners' tactic better than this section of their brief.

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7. The Petitioners at Page 15 of their Brief raise the issue that "because of the unsettled state of the law, as evidenced by the foregoing cases, it is virtually impossible in many circumstances to predict whether a public employee's speech is protected, or indeed, even to predict the analytical framework that a court will employ in making the determination." Respondent would state that Petitioners have never contested in the lower courts the "analytical framework that a court will employ in making its determination". Petitioners below have only contested the result of the analysis—that the Courts have found that Respondent engaged in protected speech. Neither Petitioners nor Respondent are before this Court on testing the appropriate "analytical framework" to reach the answers to the questions posed by Petitioners. Petitioners are only here to determine whether the Courts did in fact reach the correct conclusion.

Petitioners have framed their entire argument so as to draw this Court into a fray which imposes one analytical framework on all courts to interpret these cases. *See Waters v. Churchill,* 114 S.Ct. 1878 (1994) (Scalia, J. concurring, joined by Kennedy and Thomas, JJ.) The analytical construct imposed by *Connick* in 1983 is more than sufficient. New procedural overlays only serve to complicate not simplify the process.

Petitioners argue that the **facts** in *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) *(en banc), cert. denied*, 488 U.S. 909 (1988) and the **facts** in the case at bar are identical **because** in both cases the employees were responding to work related inquiries from superiors. Petitioners then go on to argue that despite the "identity" of the **factual** situations, the conclusions reached by the Tenth and Eighth Circuit Courts of Appeal were opposite, according to Petitioners, thereby definitively demonstrating to this Court that different approaches on the same **facts** lead to different conclusions requiring this Court's intervention to no doubt bring the Eighth Circuit's (errant) opinion in line with that of the Tenth Circuit's opinion in *Koch*. The fallacy of this argument lies in the definition of the "identity of facts".

It is not **how** the alleged protected speech came about—here both employees were responding to job related inquiries—but whether the employee's speech in response to the job related inquiry contains information that is important to the general public **and is not** related in whole or substantially in part to the employee's performance of the matter on which he is speaking. Respondent spoke about his investigation of what other's had done before him which he believed raised issues of misfeasance, malfeasance and possibly future harm to the public occasioned by some of the same Board members to whom he was then reporting. In *Koch* the employee was reporting on what he himself had found, and it was questioned whether he was properly acting at the time. In *Koch*, Koch himself was the focal point of the inquiry. In *Kincade*, as in other cases where First Amendment Protection has been found, Kincade is not the focal point but as the Eighth Circuit stated (citing *Connick* at 147-48) at App. 11:

> The focus is on the role that the employee has assumed in advancing the particular expressions: that of a concerned public

> citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution.

Petitioners by focusing on how the speech comes about, and then looking at the conclusion in *Koch* and *Kincade* then reach the conclusion that the Eighth and Tenth Circuit decisions could not have used the same analysis and therefore the analysis is flawed. That is not the case. Both the Eighth and Tenth Circuits used the same analysis as set out in *Connick* above: whether Koch and Kincade were informing the public about the state institution not properly discharging its duties or whether they were merely talking about internal policies or practices. In *Koch* the Tenth Circuit found Koch was focusing on internal policies or practices, while in *Kincade* the Eighth Circuit found that Kincade focused on public wrongdoing. Both decisions are consistent with *Connick* although reached through different analyses.

The protection afforded Kincade's speech was to be expected. It falls within the first type of case recognized by *O'Connor* that where the content of the speech clearly identifies the speech as protected there need be no further analysis. *Koch* falls clearly in the second class of cases, where although he speaks on a matter of some public concern, it is the speaker's intent which clarifies that the speech is not covered by the First Amendment.

The Eighth Circuit in *Kincade* has not fashioned a "per se" rule which raises the scepter of "potential government liability

for almost any adverse employment decision" as Petitioners claim. Rather, *Kincade* is but another in a long line of cases which protects government employees from retaliation[8] for bringing to light matters of public concern. For these reasons Petitioners' Writ should be denied on its initial question to this Court.

II.

THE RIGHT ALLEGEDLY VIOLATED IN THIS CASE *WAS* CLEARLY ESTABLISHED AT THE TIME OF THE GOVERNMENT OFFICIALS' ACTIONS AND, BY DENYING THE OFFICIALS QUALIFIED IMMUNITY PRIOR TO TRIAL, THE LOWER COURTS DISREGARDED THIS COURT'S DECISION IN *HUNTER V. BRYANT.*

While Petitioners claim they are relying upon *Hunter v. Bryant,* 502 U.S. 224 (1991) (*per curiam*) for their claim that the right allegedly violated in this case was ***not*** clearly established at the time of the BOA's decisions in 1991 and therefore the lower courts improperly denied the individual Petitioners' qualified immunity, in fact their argument is as stated before the Eighth Circuit en banc in their Petition for Rehearing and Suggestion for Rehearing en banc: that because they and other defendants in 1983 actions have raised questions as to whether a particular circumstance is "clearly established" that does in fact mean the issue is "debatable" and therefore because it is "debatable" it cannot be "clearly established". Such circuitous "logic" borders on the frivolous but certainly has no basis in any appellate court decision that appellants or appellee have been able to locate on "qualified immunity". Under such a "rationale" a court could

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8. Of course, Kincade must still prove that his speech did in fact cause his termination.

never find "clearly established", which no doubt is the goal of all defendants who have been denied "qualified immunity".

As the Eighth Circuit stated at Petitioners' Brief, App. 19:

> We likewise disagree with the Appellants' argument that they are entitled to qualified immunity because the state of the law was unclear with respect to whether a public employee can be speaking on matters of public concern when the speech is made in his capacity as a public employee. At the time of Kincade's termination, the cases made clear that speech touches upon a matter of public concern when it deals with issues of interest to the community. *Connick*, 461 U.S. at 146, *Cox*, 790 F.2d at 672. As noted above, Kincade's speech clearly addressed issues that the public would be interested in, not issues that have some personal interest only to Kincade.

Petitioners seem to believe that merely because there is "debate" among the Circuits or even within the Circuit about the application of 1983 to a government employee speaking as an employee, this translates to a lack of "clearly established" principles. But *Connick*, decided in 1983, was and remains very clear about what is protected speech. The dichotomy which Petitioners see—based on a skewered view of the law concocted so as to create a conflict—is but a facade. No one who directs his attention to what Kincade said on August 5, 1991 can state that such speech was not clearly speaking about a matter of public concern.

Petitioners see "conflicts" between *Bausworth* and *Mumford v. Godfried,* 52 F.2d 756 (8th Cir. 1995) where the Eighth Circuit sees none. In *Mumford* the Eighth Circuit showed how *Bausworth* was in fact consistent with prior decisions. Lawyers trained in the "turn of the phrase" can always find new "spins" to put on factual situations to conjure up visions that the law is not settled and therefore courts must intervene to "clarify" the situation. But here, as in so many cases, the "lawyers" have overreached.

Respondent Kincade's constitutional exercise of the Free Speech Clause protects him from retaliation. A reading of what he claims to have said to the BOA in August of 1991 demonstrates facially that all but the most incompetent should have known he was so exercising his First Amendment rights. Petitioners' second question on appeal should therefore be denied.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — AFFIDAVIT OF RON KINCADE

STATE OF MISSOURI)
)
COUNTY OF JACKSON)

I, Ron Kincade, do state upon my oath:

1. That I applied for the position of Director of the Department of Public Works/City Engineer advertised by City.

2. That in deciding whether I wished to go to the City as Director of the Department of Public Works/City Engineer, it was important to me to know whether the BOA would support enforcement of the subdivision ordinances and not "bow" to the pressure of developers in the City.

3. That during my interview with Siems and the BOA I specifically asked whether the developers in the City had any "clout" with the BOA with regard to enforcement of subdivision ordinances; that I was informed and assured that they did not, and that the BOA expected me to enforce the subdivision ordinances for the City.

4. That I was thereafter offered the position of Director of the Department of Public Works/City Engineer by the BOA; and based upon the representations made to me by some members of the BOA that they would support me in my enforcement of City ordinances, I accepted the position offered me.

5. That shortly after I went to work, House and I had a difference of opinion about the display home ordinance section; at that time House told me, in the presence of Beaty, that if I did not do what the developers wanted, he would make a few telephone calls and I would be gone.

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6. That thereafter I reorganized the Department of Public Works/City Engineer and put in place procedures to ensure the orderly handling of projects by my department, and also procedures to ensure that the Subdivision ordinances were in fact consistently interpreted by me and my Department and followed by developers and builders in the City.

7. That with the institution of the new procedures in Engineering to ensure the orderly handling of projects and consistent enforcement of Subdivision ordinances I became aware of "complaints" from developers and builders that the City and particularly Engineering was "not responsive" to the developers and builders, that Engineering was "causing delays" in the procurement of permits; that Engineering was "changing interpretations"; that Engineering was "not cooperative"; that Engineering "required changes to plans on multiple occasions"; these complaints were voiced to either me directly or I was told about them by others in my department or in the City.

8. That members of the BOA, Grounds and Siems made little if any inquiry of Engineering, including myself, either directly or through Siems, to determine the underlying reasons for the complaints, including whether they were the result of my enforcement of city ordinances as required by the BOA, Grounds and Siems.

9. That shortly after I came to work for the City, I was advised through a "Citizen Request form" that BOA member Ericson had made an inquiry as to whether Waterfield Dam was structurally capable of supporting Adams Dairy Parkway; this inquiry required me to research the entire history of the dam, and resulted in an investigation which encompassed matters beyond the original inquiry of Ericson but were vital to an understanding

of the current situation as well as status of the dam, and which raised engineering issues as well as contractual issues which required resolution.

10. That in June of 1991, approximately one year after my hiring, I was given my annual review by Siems; that during that interview (as well as other times) Siems told me I should be sensitive to the "P" factor (political factor) in making decisions; but I was not informed by Siems that the BOA was displeased with me in any way, my department, the responsiveness of my department to citizen inquiries, or my department's enforcement of City ordinances; that I was given an overall "good" evaluation which was accompanied by a recommendation that I receive a pay increase which was comparable or above that given other department heads for the fiscal year.

11. That I contend such complaints were the result of my actions in enforcing the City's ordinances as required by the BOA, Grounds and Siems and that therefore my actions in enforcing the City ordinances constitute a First Amendment expression deserving of First Amendment protection.

12. That as a result of my review of City documents I determined that in 1987 the City, through the BOA, of which House was then a member, approved the construction of Waterfield Dam, hereinafter referred to as "dam", by Weatherstone, contingent upon said dam meeting the requirements set forth in the E.J. Werner & Associates', hereinafter referred to as "E. J. Werner", hydraulic and hydrologic report and the Alpha-Omega Geotech, hereinafter referred to as "Geotech", reports.

13. That I also determined from my investigation that in

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1987 Siems, as City Administrator, without the required authority of the then BOA, approved payment to Weatherstone and House of $62,510 for the purpose of widening the dam from its specification width of 50 feet to a proposed width of 60 feet so that Adams Dairy Parkway could in the future be constructed on the dam.

14. That on March 15, 1991 I informed Siems, by memorandum, of the problems I saw with the construction of the dam, and consequently my inability to approve the final plat of Waterfield; I also informed Siems that if House and Weatherstone were not made to comply with the original specifications for the dam at this time, the City would have no authority after the final approval of the 6th Waterfield plat to make House fulfill the original requirements.

15. That on March 21, 1991 Weatherstone and the City, through the mayor, signed the Development Agreement, after changes were made by the BOA of which I did not approve, and the final plat of Waterfield was approved contingent on fulfillment of the terms of the Development Agreement.

16. That during the next months as part of my continuing investigation on the Waterfield Dam and in an attempt to determine whether House had met the requirements of the March 21, 1991 Development Agreement, in accordance with directions from the BOA, I determined:

a. that the $62,510 paid to House and Weatherstone had not been presented for approval to the BOA in accordance with City ordinances;

b. that the monies had been paid to House and

Weatherstone even though the work had not been completed by House and Weatherstone;

c. that it was not possible to determine with 100 percent accuracy whether the dam had been built according to the approved designs;

d. that the required emergency spillway had not been built and that consequently the dam posed a potential safety hazard to the homes downstream; and

e. that although the Development Agreement provided that certification of the dam be provided by Weatherstone within 45 days of the signing of the Development Agreement, that certification had never been provided the City at any time although I sought to obtain same from House and Weatherstone on numerous occasions;

f. that Geotech, in April of 1991, only certified that the dam was designed in compliance with state standards, but did not certify the dam, as built, was in compliance with the design approved by the City as set forth in the March 21, 1991 Development Agreement.

17. Although I was not requested to direct my attention to all of these issues, these issues were addressed by me in an attempt to address all the issues associated with the "structural" aspect of the dam and the City's dealings with the developer on the Dam.

18. That I informed Siems during the summer of 1991 that City procedures regarding the $62,510 paid to House and Weatherstone had not been complied with.

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19. That on August 5, 1991 at a meeting of the BOA, I responded to Ericson's inquiry as well as presenting the additional problems with the dam which I had determined as a result of my thorough investigation of the dam and the dealings of the City with House. These "problems" consisted of:

a. that the north end of the dam did not have required embankment materials;

b. that because the north end of the dam did not have the required embankment, the emergency spillway required by the design plans was not present thereby incurring the likelihood of erosion and reduced structural integrity of the dam;

c. that additionally, the emergency spillway was not constructed of concrete as required by the design plans thereby contributing to the potential of erosion of the dam;

d. that the design for the dam had called for a 50 foot width at the top; the City had contracted for an additional 10 feet to be added to the width of the dam, for a total 60 foot width, for the purpose of providing a crossing for the Adams Dairy Parkway; the dam was actually only 42 to 49 feet wide as of August 14, 1991;

e. that the City had paid $62,510 to House and Weatherstone in June of 1987 even though the work had not been completed;

f. that the dam had never been certified in compliance with the Development Agreement or the 1987 Geotech report; and,

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g. that because of the inadequacies of the dam, that homes and residents in those homes downstream of the dam and within several hundred yards of the dam were at risk of flood damage and personal injury if the dam's structural integrity was compromised by erosion from the aforesaid inadequacies.

20. I consider this an expression of my first amendment rights.

21. On August 15, I met with House, (together with Beaty and Kuntz) at the direction of the BOA at the August 5 meeting, to discuss the "problems" that I had relayed to the BOA on August 5. House told me at that time that the City would have to sue him to get him to do anything with the dam.

22. That later in September, I again approached Siems and informed him that House was still in violation of the Development Agreement with the City; but Siems told me it was up to Grounds and the BOA to determine whether any action would be taken to enforce the Development Agreement with House.

23. That at no time after August 28, 1991 did Siems come to me and tell me that the BOA had had a meeting to discuss my performance, nor did he tell me that BOA members had expressed to him that I should improve my communication skills with them, the citizenry of Blue Springs, or those who did business with the City, nor did I hear from Siems orally or in writing that the BOA perceived I had some performance problems that needed resolution.

24. On October 10 Siems asked me to provide him a copy of

the Development Agreement with House. Calhoun, my secretary, told me that Grounds had told her to provide him with a copy of the Development Agreement.

25. That same day I went to Siems' office and I asked Duff, City Clerk, if Siems was available. I was told by Duff that Siems was in a meeting with Grounds and House. I looked at Siems' office and his door was closed. I believed this meeting was intended to resolve the City and House's disagreement over the dam by circumventing my professional engineering objections concerning the dam as City Engineer because:

a) I had been asking Siems since August 5 on numerous occasions, and as recently as early October, about the resolution of the Dam issue because I knew the dam issues had not been resolved, but Siems had told me the Mayor and the Council would have to resolve the issue; and

b) Siems and Grounds had asked for copies of the Development Agreement immediately prior to this meeting; and,

c) I had not been told about nor asked to attend the meeting of House, Grounds and Siems.

26. During the following weekend, I started to become concerned, based upon my belief that at the meeting of House, Grounds and Siems on the 10th the Mayor and Siems "cut a deal" with House not to follow through with my recommendations, and that consequently the City did not have, and would not have, authority to use Waterfield Dam as a detention basin for subdivisions upstream such as Waterfield North or Fox Trail.

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27. On October 14, 1991 in preparing for agenda items for the Planning Commission meeting that night, when I saw that the plats for Waterfield North and Fox Trail were on the agenda, I became concerned about the repercussions of House's recent refusal to comply with the Development Agreement and the absence of a response from the BOA to enforce the Development Agreement, as well as the recent meeting of October 10 including:

a. how such refusal affected developers who were presenting for approval that night storm water detention plans which utilized Waterfield Lake as a detention facility; and

b. how permitting such developers to use Waterfield Lake as a storm water detention facility might expose the City to damages and liability because Waterfield lake and dam had not been accepted by the City as of that date because the lake and dam were not in compliance with subdivision ordinances regarding a water detention facility.

28. That I approached Siems on the morning of October 14 regarding the problems and Siems indicated that we should discuss the issue with Grounds prior to the Planning Commission meeting; Grounds however was not available for a meeting until late that afternoon.

29. That immediately prior to the Planning and Zoning Commission meeting on October 14, Grounds met with me and Siems; that I brought up the problems that I saw; that Grounds thereafter led the discussion that there was a potential for City liability; as we were getting ready to leave I asked Grounds how

he wished me to handle the matter; *in response to my question,* he requested me to withdraw my recommendation to the Planning Commission that the plats of other developers who were to discharge into the Waterfield Lake be approved as long as they agreed to escrow $200 per lot and told me to get in touch with Kuntz, McDonald and the Developers. I told him, given the late hour, I would do what I could.

30. As the meeting recessed late, I was unable to reach any of the individuals. When I got to the Planning and Zoning meeting, I informed Kuntz that I would withdraw the recommendation as he and I had discussed earlier in the day; I briefly mentioned the matter to McDonald but was unable to talk to the developers.

31. That I had no meeting with Grounds and/or Siems on October 11 at any time as alleged by Grounds in his affidavit and deposition.

32. That at the Planning Commission meeting I explained that I had to withdraw my department's recommendations for certain plats because it had become clear that such recommendation might expose the City to liability because the City had not accepted the dam and lake as a water detention facility as yet; that at the request of the chairperson of the Planning and Zoning Commission meeting, I told the Planning and Zoning Commission meeting that it was up to the Mayor and the BOA to enforce the Development Agreement with House.

33. That thereafter a vote was taken on the plats and I was the lone dissenting vote; Grounds did not support me although he had admitted to me privately late that afternoon that BOA approval would expose the City to liability and had openly

expressed during the Planning and Zoning Commission meeting that water should not be put behind the dam.

34. That I contend my discussion at the Planning and Zoning Commission meeting regarding Waterfield Dam, my withdrawal of recommendation of certain plats and my laying blame at the feet of the Mayor and BOA for the failure to require House to complete the construction of the dam in accordance with the approved plans and fulfill the requirements of the Development Agreement constitutes First Amendment expression deserving of First Amendment protection because the withdrawal of recommendation was done at the direction of the Grounds, and the laying of blame was done in response to inquiries from the Chairperson of the Planning and Zoning Commission, and because he raised matters of public concern to the BOA, including (by inference) the potential negligence of prior BOA members and Grounds in the following regards:

a. that BOA members after 1987 failed to follow through to determine whether House and Weatherstone had in fact built the dam as approved in the plans;

b. that BOA members after 1987 had allowed the dam to exist without an emergency spillway which posed a potential downstream hazard.

35. After the October 14 meeting and before I was terminated, Siems came to my office and closed the office doors and told me that the Mayor had told him that a large group of developers were coming to the BOA meeting (coming up) to demand my termination. I asked him if they had the votes and he said he did not know. I then asked him how he would respond to a question about my performance and he said that I was doing my

job and if someone on the Board didn't think so they should tell me.

36. That at no time did Grounds, Siems, Ericson, Clark, Morgan or Spears ever indicate to me that I was disloyal, that they could not work with me, that my actions reflected poorly on the city, or that my first amendment expressions as indicated above were "frustrating" the efficiency of my department.

37. I was not instructed by Siems at my performance review to pay *immediate* attention to: meeting deadlines, my alleged inability to consider alternatives to situations, my need to work on interpersonal skills, my alleged inability to be flexible, my alleged refusal to compromise scheduling of one project for another project, my allegedly harsh delivery style with communicating with others, my alleged defensiveness, my alleged inability to admit I am wrong, my alleged poor relationship with peers in other departments. Rather these were topics that were discussed in an overall good performance evaluation, and were merely items he expressed that I needed to improve upon.

38. I was never rude to any citizen who made inquiry of me.

39. I never had a BOA member or any City employee tell me they could not get along with me, that I was disloyal to the BOA or the City, or that I did not communicate with them well.

40. I do not recall any instance where I failed to turn in a report to the Planning Commission; there were some instances where the Planning Commission report did not contain the City Engineer's comments but these were provided at the Planning Commission meeting.

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41. I know of no meetings that Mr. Warren Parker scheduled with me or for which he requested me to be personally present which I did not attend.

42. I never failed to return telephone messages which I received. There were times when I returned the message that the individual was not available. There were also times, of which I am aware, that I did not get messages because the telephone calls were routed elsewhere and neither I, nor others in Engineering, got the message.

43. During my tenure at the City, I and my staff consistently interpreted and enforced the City ordinances, subdivision regulations and standards as adopted by ordinance as they were written.

44. All plans that came to Engineering were completely reviewed initially and all incompletions and all corrections that could be noted at that time based on the degree of completion of the plans submitted were made known to the builder and the builder's engineer; if there were items which were not on the plans or were incorrect, the plans would be returned for completion and/or correction by the builder's engineer; if the returned plans still were not complete and/or correct, then this would require the plans to be returned a second, (and sometimes a third or more), time to the builder's engineer for completion and/or correction of new items on the plans. It was the incompletion and or incorrect items which caused the delay in the processing of the plans, not Engineering's review of the plans. At the request of Siems, this was not done on the Blue Springs Bank project but was made known to Blue Springs by letter at the time of the initial partial review of plans.

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Further affiant saith not.

_____

Ron Kincade

Subscribed and sworn to before me this 12th day of September, 1993 before me the undersigned notary public in and for the above county and state.

_____

Notary Public

My commission expires:

Supreme Court, U.S.
FILED
APR 4 1996
CLERK

No. 95-1119

(3)

In The

Supreme Court of the United States

October Term, 1995

CITY OF BLUE SPRINGS, MISSOURI, et al.,

Petitioners,

vs.

RONALD KINCADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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FURTHER REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Respondent has adopted the Questions Presented For Review in the Petition and has conceded that "the only claimed First Amendment expression before this Court is the expression which occurred on August 5, 1991 at a closed meeting of the Board of Aldermen in Blue Springs, Missouri." (Respondent's Brief in Opposition at *i* & 1). For purposes of review by this Court, Petitioners do not contest Respondent's version of his allegedly protected speech at the BOA meeting as set forth in the Eighth Circuit's opinion and in Respondent's affidavit. (*See* App. at 4-5, n.2; Respondent's App. at 6a-7a).

In addition, the Eighth Circuit noted that Kincade's report to the BOA, constituting the allegedly protected speech, was made "in his capacity as City Engineer and pursuant to an assignment from the BOA." (App. 3). Although Respondent now contends in his Brief in Opposition that this statement is "overbroad" and "contrary to the record," the Eighth Circuit merely relied on Respondent's own statement to this effect in his pleadings. Thus, the relevant facts for review in this Court are entirely undisputed.

II. ARGUMENT

A. Respondent Acknowledges That The Circuits Are In Conflict On This Important Issue of First Amendment Law.

This Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), addressed the circumstances in which a government employee's speech is protected under the First Amendment. Respondent concedes that the Court's decision has resulted in the courts of appeals employing "slightly different" case-by-case analyses. (Brief in Opposition at 4). In fact, the approaches are more than "slightly" different. As demonstrated in the Petition, the courts of appeals have adopted widely divergent modes of analyzing whether the speech at issue is protected.

Respondent suggests that all of the cases Petitioner relies upon to demonstrate a conflict in the circuits are consistent with *Connick* and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Respondent argues that those cases cited by Petitioner which rest primarily upon a distinction between whether the employee was speaking as an "employee" or as a "citizen," and those which are based largely upon the intent of the employee in making the speech, reveal a "growing consistency" among the circuits. Respondent contends that these cases are all dependent upon a "common thread," namely a case-by-case focus on whether the employee's speech was directed at some public good or instead simply at some personal agenda. (*See* Brief in Opposition at 9-10 & nn. 5-6).

Connick and *Pickering*, however, simply did not address the situation presented by this and similar cases. Neither case involved a circumstance such as the one presented here in which Respondent was speaking in his

capacity as an employee, rather than as a citizen, on a matter of potential public concern, but only in the course of performing his official job duties. This accounts in large part for the different approaches crafted by the courts of appeals attempting to address this situation. Respondent's efforts to reconcile the appellate cases aside, the fact remains that the courts have adopted widely variant analytical approaches,[1] with some courts focusing primarily on the employee versus citizen distinction, others looking foremost to the employee's intent in speaking, and yet others relying largely on whether the content of the speech itself is likely to be a topic in which the public might be interested.[2] Clarity and guidance are needed from this Court for precisely this reason.

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[1] Contrary to Respondent's suggestion, the cases illustrating the different approaches employed by the courts of appeals cannot be viewed as consistent with one another on the basis that all of the opinions are attempting to determine whether the speech is of "public concern" or is only of "private interest." (*See* Brief in Opposition at 10). According to *Connick*, whether speech is of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48. It is the analysis employed to reach that ultimate conclusion on which the courts of appeals part company, with marked effect on the outcome.

[2] Respondent cites a number of cases in his Brief in Opposition at p. 9, nn. 5 & 6, which he contends are all understandable by focusing on the public concern/private interest distinction. As Petitioners demonstrated in their Petition, these cases reflect the full diversity of approaches that the courts of appeals have adopted under *Connick*. (*See* Petition at 10-15 & nn. 2-3). Moreover, several of the cases cited by Respondent plainly were not decided on the basis of speech involving a plaintiff's own personal conflicts or disputes. *See, e.g., Morgan v. Ford*, 6 F.3d 750, 754-55 & n.7. (11th Cir. 1993)

Additionally, the Tenth Circuit's opinion in *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988), and the Eighth Circuit's opinion in the present case graphically illustrate the need for further guidance from this Court on this issue. Despite Respondent's attempts to distinguish *Koch* from this case, the cases are analytically indistinguishable. Respondent agrees that the employees in both cases were responding to job-related inquiries. (Brief in Opposition at 11). Respondent nevertheless asserts that the employee's speech in *Koch* was not protected because the employee's performance was at issue, *id.*, whereas here it was not. Even were this true, this alone is not sufficient to distinguish these cases. The Tenth Circuit in *Koch* concluded "that the City's discharge of its duty to investigate fires

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(plaintiff not speaking solely on her own personal concern when speech included complaint of sexual harassment of another), *cert. denied*, 114 S. Ct. 2708 (1994); *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1199 (8th Cir. 1993) (plaintiff's speech to parent regarding school district's policy on charging for field trip transportation not of personal concern to plaintiff); *see also Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991) (criticism of sheriff was not matter of public concern because subject not relevant to evaluation of performance). Likewise, cases such as *Thomson v. Scheid*, turn on whether the speech involved only the plaintiff's duties as a government employee. 977 F.2d 1017, 1020-21 (6th Cir. 1992) (plaintiff's speech concerning alleged fraud of public official was not of public concern because involved only plaintiff's duties as employee), *cert. denied*, 113 S. Ct. 2341 (1993).

Similarly, the Seventh Circuit's opinion in *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir. 1985), and a number of cases following that approach, focusing on the speaker's intent, clearly evince a different approach in whole or in part from the cases above. (*See* Petition at 12-14 & n.3).

and determine their causes could be a matter of great public concern[,]" as could Koch's competence to perform his job. 847 F.2d at 1447. Although Koch contended that his speech was motivated by a desire to inform the public of what he viewed as the defendants' misfeasance, the court concluded that neither Koch's fire investigation report nor his conclusion were "in any way motivated or inspired by such alleged improprieties [by the defendants] or by the desire to expose those improprieties." *Id.* at 1448. Rather, the report was simply a routine report performed by Koch as part of his job, *id.* at 1447, which in any event did not "sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government." *Id.* (citations omitted). The same is true in this case but the Eighth Circuit apparently overlooked some of these considerations and scarcely acknowledged others.

Respondent observes that both *Koch* and the present case "are consistent with *Connick* although reached through different analyses." (Brief in Opposition at 12). If it is accurate to say that both decisions are consistent with *Connick*, then a significant ambiguity exists in *Connick* which this Court should clarify. If that statement is not accurate, the Court should provide additional guidance to the lower courts concerning the appropriate standard to apply in cases involving employee speech in the course of performing work assignments. In either event, the Court should hasten to rescue the lower courts as well as unsuspecting governmental entities and their officers, from the quagmire created by the uncertainty as to the appropriate analytical framework for determining whether an employee's speech is protected under the First Amendment.

Citing *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993), Respondent contends that his speech regarding the safety of a residential dam must be protected speech because the content alone should reveal that the speech is a matter of public concern. At the same time, Kincade contends that Koch's speech regarding the investigation of fires properly was analyzed under the second category of speech referred to in *O'Connor*, i.e., that which is of some public concern but for which the court looks to the speaker's intent to determine First Amendment protection. There is no logical basis for drawing such a distinction between Respondent's speech and the speech in *Koch*.[3]

Respondent complains that Petitioner is attempting to have this Court "impose one analytical framework on all courts to interpret these cases." This is precisely correct. An important constitutional issue such as the one presented here should not result in the application of a host of different analytical paradigms and contrary results by the lower courts. The uncertainty created by the *Pickering-Connick ad hoc* balancing approach as it now exists makes it virtually impossible for governmental officials to predict whether an employee's speech in a given instance is protected expression or not.

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[3] Likewise, under the approach which Respondent offers here, there would be no basis for distinguishing virtually any of the cases cited in n.2, *supra*; the content of the speech in each case alone would almost certainly dictate the conclusion that the speech was protected. Those decisions, however, reached the opposite conclusion.

B. The Various Approaches And Results Reached By Lower Courts On Facts Similar To Those Presented Here Clearly Demonstrate That Defendants Are Entitled To Qualified Immunity.

The foregoing discussion and that in Petitioner's original brief demonstrate that one cannot possibly say that the law in this area was "clearly established" in any meaningful sense at the time Petitioners made the decision to terminate Respondent. *Connick* and *Pickering* do not address the situation presented in this case – an employee speaking in his capacity as an employee in response to a work assignment on a matter of potential public concern. The disparate approaches adopted by the lower courts reflect that the members of the BOA were not "plainly incompetent"; if the courts are unable to employ any uniform standard for addressing this issue, and arrive at different conclusions on remarkably similar facts, surely the elected government officials in this case should not be held personally liable for money damages for arriving at a conclusion that may later be deemed incorrect.

To deny the individual defendants qualified immunity in this case, as the Eighth Circuit did, violates this Court's instruction in *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam). The court below did not inquire whether defendants reasonably could have concluded that Respondent's speech was not constitutionally protected under settled law. Rather, many years after the fact, the courts below determined that Respondent's speech was constitutionally protected based on changing law. This unquestionably contravenes the holding of *Hunter*, since

at the time it was made, defendants' "decision was reasonable, even if mistaken." *Id.* at 228 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

CONCLUSION

For the reasons stated in this Reply and in the original Petition, petitioners respectfully request that the Court grant plenary review of both questions presented. In the alternative, petitioners request that the Court summarily reverse the Eighth Circuit's denial of qualified immunity to the individual petitioners on the basis of *Hunter v. Bryant*.

Respectfully submitted,

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